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In the

Supreme Court of the United States

October Term, 1958

No. 814

REYNOLDS METALS COMPANY, *Petitioner,*
v.
PAULA MARTIN YTURBIDE, *Respondent.*

REYNOLDS METALS COMPANY, *Petitioner,*
v.
VERLA MARTIN, *Respondent,*

REYNOLDS METALS COMPANY, *Petitioner,*
v.
PAUL MARTIN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now REYNOLDS METALS COMPANY, a corporation, and respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cases by the Court of Appeals on June 5, 1958.

OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon in denying the motion of petitioner for a directed verdict is printed at 135 F. Supp. 379, and is appended hereto at pages 65 to 73.

The three opinions of the United States Court of Appeals for the Ninth Circuit affirming the three judgments of the United States District Court for the District of Oregon are appended hereto at pages 74 to 95.

The opinion of the United States Court of Appeals for the Ninth Circuit, after rehearing, affirming judgment of the United States District Court for the District of Oregon is appended hereto at pages 96 to 130.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was dated April 24, 1957, and was entered on the same day.

July 24, 1957, an order of said court was filed granting a petition for rehearing, and on July 29, 1957, an order of said court was filed directing that the cause be reheard en banc. The second judgment of said court was dated June 5, 1958, and was entered on the same day.

This court has jurisdiction to review the judgment in question by a writ of certiorari by reason of 28 USCA 2101(c).

QUESTIONS PRESENTED

1. Was the decision of the Court of Appeals that the doctrine of res ipsa loquitur should be applied to the facts in these cases in conflict with the applicable law of the State of Oregon?

2. Was the decision of the United States Court of Appeals for the Ninth Circuit that the pre-trial examination of two of the physicians of respondents Paul Martin and Verla Martin was properly limited in conflict with the applicable law of the State of Oregon?

3. Was the decision of said court that the claims of respondents Paul Martin and Verla Martin were not subject to the two-year statute of limitations of the State of Oregon in conflict with the applicable law of the State of Oregon?

STATUTES

1. *1 Oregon Rev. Statutes*, § 12.010, p. 75

> "Actions at law shall only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute. The objection that the action was not commenced within the time limited shall only be taken by answer, except as provided in ORS 16.260."

2. *1 Oregon Rev. Statutes*, § 12.110, p. 76

"(1) An action • • • for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; • • •"

3. *1 Oregon Rev. Statutes*, § 44.040 (1) (d), p. 275

"A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action, suit or proceeding, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient."

4. *1 Oregon Rev. Statutes*, § 44.040 (2), p. 275

"If a party to the action, suit or proceeding offers himself as a witness, it is deemed a consent to the examination also of a wife, husband, attorney, clergyman, physician or surgeon, stenographer or licensed professional nurse on the same subject."

STATEMENT OF THE CASES

A. Preliminary Statement

The decision of the Court of Appeals in these cases has imposed on petitioner a liability unprecedented and certain to produce the severest repercussions on the conduct of hitherto lawful industry everywhere. The court

by an erroneous application of res ipsa loquitur in effect ruled that the operation of an aluminum reduction plant —an operation similar to any one of several other vital industrial processes in which fluorides escape, such as steel plants and fertilizer plants—rendered the operator absolutely liable for the assorted ailments of the surrounding population, even though the operator took every conceivable precaution against injuring anyone and in fact reduced the amount of fluorides escaping far beyond the point where they were ever capable of harming residents in the area near the plant. Those who wish to do so can interpret the decision as laying at the feet of these fluoride-producing industries the sole responsibility for the indigestion, backaches, excess weight and other commonplace ailments of those who live near their plants, whether the plants are shown to endanger those persons or not. The burden which could be thus imposed on a lawful industry is staggering. The decision of the Court of Appeals is obviously, therefore, not only of importance to the parties, but also to the public.

B. Summary of Facts

From December, 1946, to November, 19[illegible] the three respondents lived together on a cattle farm near Troutdale, Oregon, about a mile and a half upwind from petitioner's aluminum plant. Beginning about the

middle of 1947, they claim to have acquired a number of symptoms, which were fully developed by 1948. These alleged symptoms, which varied somewhat among the three, included, among other things, excess weight, stiffness of the spine, pains in the joints, liver impairment, flatulency, polyps in the nose, sinusitis, shortness of breath, diarrhea, excessive sweating, clicking in the ankles, wheezing, mottling of the teeth, indigestion, hypothyroidism and bladder irritation (R. 1913-5, 1933-4, 1939-40, 1984).

The respondents began to consult doctors, in all some 16 of them. Of these, five testified at the trial in a speculative fashion and with varying degrees of hesitation that the respondents were victims of fluorosis, although not necessarily with regard to all these symptoms.

None of these doctors claimed ever before to have seen or heard of fluorine's producing such symptoms in this country. Each replied in the negative as to whether the respondents showed the two concrete signs commonly regarded as tests for the excessive intake of fluorine—skeletal changes as shown by X rays and an abnormal level of fluorine in the urine.

On the other hand, five doctors called by petitioner testified that the respondents' symptoms could not conceivably be attributed to fluorine.

Aluminum has been produced by electrolysis since before the beginning of the century. See, for example, the discussions in *United States v. Aluminum Co. of America* (CA 2, 1945) 148 F. 2d 416, 422, and in the District Court (S.D. N.Y., 1941) 44 F. Supp. 97, 112. Emissions of fluoride, even when precautions of the sort taken by petitioner were not present, have never been known to injure residents in the vicinity.

Petitioner had no means of foreseeing that the amounts of fluoride released from an aluminum plant could or would cause injury to human beings under any circumstances, much less injuries of the type and under the circumstances here alleged. No evidence was introduced by respondents that any such injury was foreseeable.

Nevertheless, to remove any possible hazard to cattle or vegetation, and not because of any possibility of injury to humans, petitioner, as is stated in detail below, has installed at great expense the best devices that it could design to minimize emissions from the Troutdale plant of all waste, including fluorides. In 1946 it installed a spray fume-control system which was the best then developed (R. 1160, 1278). The present dual system of pot hoods and roof scrubbers is the only one of its kind in any aluminum plant in the United States (R. 1530). It cost over $2,118,000 to install (R. 434) and in

1950 alone cost over $129,000 to operate (R. 433). No evidence was presented that any better control system was possible.

However, some fluorides escape and will continue to escape in the future, in amounts which heretofore have uniformly proved to be harmless. Thus the choice is between the release of this amount of fluorides or the cessation of the production of aluminum in inhabited areas. Inasmuch as electrolysis on this scale can be performed only where there is an abundance of water power, the available sites are limited and in general inhabited. *United States v. Aluminum Co. of America* (S.D. N.Y., 1941) 44 F. Supp. 97, 121. Thus there is no practicable alternative to release of fluorides except cessation of production altogether.

The importance to the public generally and to industry specifically of the decision of the Court of Appeals is apparent from the fact that the following corporations filed Briefs Amicus Curiae upon the rehearing en banc: Aluminum Company of America, Kaiser Aluminum & Chemical Corporation, Monsanto Chemical Company, Olin Mathieson Chemical Corporation, Victor Chemical Works, Harvey Aluminum, a Division of Harvey Machine Co., Inc., and West Vaco Chemical Division of Food Machinery & Chemical Corporation.

C. Jurisdiction

These actions were submitted to the jury on September 15, 1955. Late in the following day the jury returned its verdict in favor of respondent Paul Martin for the sum of $17,764.30, its verdict for respondent Verla Martin for the sum of $12,764.30, and its verdict for respondent Paula Martin for the sum of $7,764.30. The United States District Court for the District of Oregon thereafter entered judgments based upon the aforesaid verdicts.

Jurisdiction of the United States District Court for the District of Oregon was based upon diversity of citizenship and the amount in controversy, under 28 USCA 1332.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

Petitioner submits that this court should review the decisions of the United States Court of Appeals for the Ninth Circuit for the following reasons:

I

The decisions of said court that the doctrine of res ipsa loquitur should be applied to the facts in these cases is in conflict with the applicable law of the State of Oregon.

II

The decision of said court that the scope of examination before trial of two of respondents' physicians was properly limited is in conflict with the applicable law of the State of Oregon.

III

The decision of said court that the claims of respondents Paul Martin and Verla Martin were not subject to the two-year statute of limitations of the State of Oregon is in conflict with the applicable law of the State of Oregon.

ARGUMENT

I

The decision of said court that the doctrine of res ipsa loquitur should be applied to the facts in these cases is in conflict with the applicable law of the State of Oregon.

A. Unless an inference of negligence was raised by the doctrine of res ipsa loquitur, there was no evidence that petitioner was negligent.

1. *The uncontradicted evidence showed that petitioner used the greatest possible care in minimizing the emission of fluorides.*

Aluminum is produced at the Troutdale plant by electrolysis. Raw materials are placed in large pots. Electrical energy is introduced, and aluminum in liquid form is deposited in a cavity at the base of the pot (R. 116-8). The Troutdale plant was made up of 512 pots until 1951 (R. 26).

Some of the raw material going into each pot contains fluorine. When electrolysis deposits the aluminum, therefore, free fluorine is produced as a necessary by-product of the process. Much of the fluorine thus produced is absorbed by the carbon lining of the pot. The rest emanates from the pot and immediately combines with various other elements to form gases, fumes and particulates known generically as fluorides (R. 115-9). Unless removed, these pass on to the atmosphere outside the plant.

The Troutdale plant was constructed for the United States in 1941 and 1942 by Aluminum Company of America, which operated it as a lessee of the Government from May, 1942, to September, 1945. During that period it was run without any fume control system (R. 1277).

During the year following the end of the War the plant stood idle. In 1946 the Reconstruction Finance Corporation acting for the United States leased the plant to petitioner.

When petitioner put the plant back in operation in September, 1946, there were indications that the previous use without fume controls might have created a hazard to cattle in the surrounding area (R. 416, 1305), inasmuch as fluorides tend to become accumulated by the grass which is the principal fodder of pastured cattle in a grazing area such as that surrounding the plant (R. 998-9).

Accordingly, petitioner undertook two projects. First, it established and maintained a grid system for keeping track of the amounts of fluorine in areas around the plant (R. 426, 1164). Second, and before it began to operate the plant, it constructed a system to control the emanation of waste products.

Petitioner installed in the entire length of the roof vent openings a system of water pipes and spray heads which sprayed a curtain of water across the openings. No fumes could pass out into the atmosphere without passing through that curtain. The water precipitated out a substantial proportion of the gases, fumes and particulates, including fluorides. These precipitations were then carried safely away (R. 415, 1278).

Witnesses for petitioner gave undisputed testimony that this system which Reynolds had devised was the then best developed fume control system (R. 1160, 1278). Harold W. Zeh, Chief Chemist and Control En-

gineer of the plant, testified that in 1946 "there was no better control system in any other aluminum plant in the United States, to my knowledge." This system was found to be 60 per cent efficient; it removed six-tenths of the waste materials coming into contact with it (R. 419). There was no other system then in operation with so high an efficiency rate (R. 441).

In late 1946 or early 1947, petitioner's staff set about complementing the spray system by adding a series of baffles, each one in the shape of a Z, between the water spray and the outlet of the roof. The water mist would strike the baffles, and the water would condense, dropping into the waste of the spray system, thus being prevented from reaching the outside atmosphere (R. 1279).

In early 1948, not more than a few months after the baffles were installed, petitioner began the construction of the pilot plant of the fume control system now in operation at the Troutdale plant (R. 1280). Installation of the complete system began in 1949, and portions of it were progressively put into operation as constructed until the entire system was finished in November, 1950 (R. 431). This new system is 90 per cent efficient (R. 1332). It is a dual operation consisting of hoods for all the pots in the Troutdale plant, connected to an induced draft system for drawing the gases, fumes and particulates through cyclones into washing towers.

as well as roof scrubbers for the capture of waste materials not drawn into the induced draft system (R. 431, 1280-2). It is a complex affair and cost over $2,118,000 to install (R. 434) with an operating cost during 1950 of over $129,000 (R. 433). No other aluminum plant in the country has such a dual system (R. 1530).

As to this matter, the Court of Appeals made the following statement (infra, pp. 111-112):

> "On behalf of plaintiffs it was urged that the evidence warranted a conclusion that the company did not exercise the care in this direction which it might have done in that it allowed the plant to be operated with the less efficient elimination system from 1946 until 1950 whereas proper care required an earlier use of the better devices.
>
> "The only bit of evidence which was taken to sustain such a contention is found in the testimony of Dr. Hunter who testified as follows: 'Q. (By Mr. Mead): Doctor, are you familiar with an *induced air system of dust control or fume control?* A. Naturally, I haven't been trained as a ventilating engineer. But since I first studied industrial hygiene in the Harvard School of Public Health with the famous Phillip Drinker—he is a ventilating engineer—and because of the work which I have to do and so teach, which is industrial medicine, I am, naturally, interested in systems of ventilation. And in all of the chapters of that book there is an exact description of systems of ventilation which are used in various parts of the world. And in 1946 it was well-known to all industrialists the world over that *exhaust ventilation* could be effectively applied to remove these effluents.'

> Possibly we can assume that the question relating to an 'induced air system' referred to the sort of system established by the company in 1950. Testimony that such a system was well known in 1946 would permit an inference that failure to use that better system at that time constituted negligence. We believe it is unnecessary in reaching our ultimate conclusion here to draw such inference from this single answer in this long record for we are of the opinion that the trial court properly submitted to the jury the question of negligence on the part of the defendant on the theory that this was a case correctly permitting the application of the doctrine of res ipsa loquitur." (Emphasis added)

Thus, while the Court of Appeals did not find that petitioner was negligent, the Court did suggest that by reason of Dr. Hunter's answer, as set forth above, the 1950 fume collection system could have been installed in 1946. This suggestion is without any support in the record, and the uncontradicted evidence is to the contrary.

In the first place, it took more than two years to design the 1950 fume collection system. This system was unknown in 1946 or at any time until petitioner installed the same (R. 445, 1530).

Secondly, the question put to Dr. Hunter, was in terms of "an induced air system of dust control or fume control." The Court of Appeals failed to note that his answer was in terms of an "exhaust ventilation" system.

which by its very definition refers to exhausting the fumes within the plant to the atmosphere outside (R. 521). Surely the Court of Appeals did not mean to say that petitioner was remiss in not artificially blowing more fluorides out where respondents could breathe them. Much as such sweeping statement from such personage as Dr. Hunter might impress an unwitting juror, it does not point to any negligent omission by petitioner. Even Dr. Hunter termed the "exhaust ventilation" system "grossly inadequate" (R. 521).

Furthermore, the Court of Appeals apparently did not consider the later testimony of Dr. Hunter that an "exhaust ventilation" system did not involve scrubbing of fluorides by water or attempting to precipitate the same as was true of the 1930 system installed at Troutdale (R. 521).

Thus, not only did the Court of Appeals fail to find that petitioner was negligent in operating the Troutdale plant but also the uncontradicted evidence is that petitioner did everything in its power to minimize the escape of fluorides.

In a case involving the emission of fumes from a sulphuric-acid plant, the Missouri court has negatived any suggestion of negligence under these circumstances. *Kelley v. National Lead Co.* (Mo. App., 1948) 210 S.W. 2d 728, 734, 735.

"The question of whether defendant was guilt (sic) of negligence in failing to install a Cottrell Precipitator so as to prevent the escape of fumes and gases is not unlike that which arises where a defendant is called upon to answer for its nonobservance of a statutory duty to place a guard upon a dangerous machine. Such a duty is absolute whenever it is possible for the machine to be guarded; and if, in such a case, it appears that there was a guard or safety device known and obtainable which would have served the purpose contemplated by the statute, the failure of the defendant to guard its machine with such device will in that event give rise to actionable negligence. Simon v. St. Louis Brass Mfg. Co., 298 Mo. 70, 250 S.W. 74. On the other hand, if there is no such device known and obtainable, the defendant cannot be held guilty of negligence in failing to install it.

"* * * If a Cottrell Precipitator had been readily procurable on the market, defendant would no doubt have owed plaintiffs the duty of promptly installing one, but since such a device was not available on the market, defendant was not guilty of any breach of duty so as to have afforded plaintiffs a remedy by an action for negligence."

2. *The uncontradicted evidence showed that no injury to human beings from the amounts of fluorine emitted was remotely foreseeable.*

As to this matter, the Court of Appeals made the following statement (infra, p. 110):

"The record here amply demonstrates that the defendant was fully aware of the potential dangers in the escape of fluorides. It is not questioned that

numerous claims of injury to cattle from the operation of such plants had been presented to this and other manufacturers. The defendant's senior chemist at the Troutdale laboratory testified that he was familiar with the literature upon the toxic qualities of these fluorides; that he knew that in quantities they were toxic; that some of these were heavier than air and would reach the earth after being airborne; that quantities of them would drift in the direction of the Martin land and that there were publications which dealt with dangers to human beings from fluorides."

This statement also reflects an unfamiliarity with the record in these actions. It is true that petitioner's senior chemist testified as indicated by the opinion. However, he also testified as follows:

(a) That his knowledge of the literature did not include knowledge of possible injury to residents in the vicinity of an aluminum reduction plant (R. 537); and

(b) That fluorides may be toxic "if an excessive amount is taken of it" (R. 538).

Thus, what this witness (and everyone else) actually said was that *in sufficient quantities* fluorides may be toxic (R. 938). He did not say that the amounts involved here were toxic, and, of course, all the evidence showed that they were not.

Furthermore, the fact that petitioner was aware of the potential danger to cattle from the escape of fluorides does not mean that petitioner was aware of any potential danger to human beings. In fact, the uncontradicted testimony is to the contrary.

So far as petitioner could possibly be aware at the time it began to operate the Troutdale plant, there was no danger at all of personal injury arising from the emanations of fluorides, even in the absence of control measures. This was but another plant of a type which had then been operating without such complaints for fifty years. The sole purpose of these elaborate control measures was to minimize the chance of property damage. So far as the record shows, never before in the history of the world has the claim been made that these concentrations of fluoride could cause personal injury. Furthermore, so far as the record shows, never before in the history of the world has anyone tried to attribute such an aggregate of symptoms to fluorosis.

There is no dispute that fluorine, like its chemical cousin, iodine, is *not* toxic, unless it is ingested *in excessive concentrations*. Small concentrations are not only harmless, but beneficial. Over 13,000,000 Americans in at least 840 communities are drinking water to which fluorine has been added. The Oregon court has found that the introduction of one part of fluorine per

million parts of water reduces dental decay among 12 to 14 year-old children 60 to 65 per cent, while doing no harm to anyone. The court cited cases in other jurisdictions unanimously reaching the same conclusions. *Baer v. City of Bend* (1956) 206 Or. 221, 223-224, 292 P. 2d 134, 135.

According to Mr. Zeh, fluoride compounds are present everywhere (R. 450). Mr. Zeh in his work had been inhaling fluorides for 21 years without ill effects (R. 450). It is uncontroverted that in sufficiently small amounts, fluorides are harmless.

The Troutdale plant was operated without fume control by the Aluminum Company of America for three years. No one living in the vicinity complained of "subacute" or any other type of fluorosis. Other aluminum plants throughout the country have operated since before the beginning of the century. No one living near those plants has complained of fluorosis.

Officers and employees of petitioner testified that they had no idea that there was a possibility of injury to residents in the vicinity of the plant, and none had ever heard of a claim of personal injury to a resident in the vicinity of an aluminum reduction plant (R. 440, 937, 1155-60, 1535).

The respondents presented no evidence of a history of human injury. On the contrary, their principal witness, Dr. Donald Hunter, testified that "there are no

writings in the United States about fluorosis in the sense of men being hurt at all" (R. 583).

Not only was there no intimation on any hand that injury was possible; there was positive indication that the operation at Troutdale was perfectly safe. A survey made by the United States Public Health Service in 1943 and 1944 had included petitioner's plant at Longview, Washington, which was then operating without any fume control system. The Public Health Service found no danger, because the weighted exposure for any one individual was less than the tolerance level of three parts of fluorine per million parts of air (R. 1555). Furthermore, at the request of the CIO, the Oregon State Board of Health examined conditions inside the Troutdale plant and found no danger (R. 1555-6).

Both studies concerned conditions inside the plant, of course, because hazard to employees was the question. Obviously, when petitioner's agents were informed that there was no danger to a man working in the potrooms themselves, they could hardly be expected to surmise that there was danger to persons not a few feet, but miles, from the source of fluorides.

There was no evidence other than that adduced by respondents through petitioner's employees as to the concentrations of fluorine present in the air. There was also no evidence controverting that which showed these concentrations to be regarded by expert opinion as en-

tirely harmless. Certainly this was far less than the tolerance level of three parts per million regarded as safe by the Public Health Service.

Dr. Willard Machle was a specialist in the field of fluorosis, a pioneer in research on fluorine in the early 1930s and the author of at least seven articles on the subject (R. 560, 1420). He had been consulted by the respondents in 1951, and at that time had written them a report advising them that fluorine from the Troutdale plant was not the cause of their difficulties. This report was prepared by Dr. Machle for the respondents four years before he had any contact with petitioner (R. 1436).

Dr. Machle testified that fluorosis appears after five or six years only when the intake approximates 120 milligrams per day (R. 1470). At most, the respondents' intake from the air could not have exceeded one milligram per day, and Edward J. Largent placed it at 110 milligrams per year (R. 1132).

The respondents gave no other evidence as to what their intake might have been.

If any further evidence was needed to show the harmlessness of the respondents' exposure, that evidence appeared in the deposition of Mr. Largent, which was read into the record (R. 1097 et seq.). Mr. Largent, an industrial chemist at Kettering Laboratory, had been

the human subject of experiments, in which he intentionally ingested measured quantities of fluorine in amounts ranging from 6 to 36 milligrams per day during various test periods. In the course of four years, he took in 3,000 to 4,000 milligrams of fluorine (R. 1124). At the rate of less than one milligram per day, the respondents could not have taken in even half that much in their four-year exposure.[1] Yet, Mr. Largent had experienced none of the respondents' symptoms or any other symptoms (R. 1125); Dr. Frank Princi had examined him before, during and after the experiments; his health was initially excellent and the fluorine caused no change in his physical condition (R. 1341-2).

Surely no claim can be made that there is any basis whatever for saying that petitioner could or should have foreseen injury to human beings in general or the present respondents in particular. The court recognized that there was no evidence introduced by respondents to show that petitioner, or its officers, had any reason to believe that there was any particular danger to human beings involved in the operation of the plant. For at practically the close of respondents' case in chief, the court stated:

[1] The statement of the court on this point is set forth on pages 1089-1090 of the typed transcript. While this portion of the typed transcript was designated as part of the contents of record on appeal (Appellee's Designation of Contents of Record on Appeal, 5 (f)), the same is not contained in the printed Transcript of Record.

"* * * And I am frank to say that from the evidence alone in this case this Court is not saying now that with the evidence before it that the officers of this corporation had any reason to believe that there was any particular danger to human beings involved in their actions."

Later the trial court stated again (R. 1880):

"* * * it is unexpected that persons being in the vicinity of such a plant would be injured or harmed by fluorine compounds emanating therefrom." * *

The statement of the Court of Appeals previously referred to (supra, p. 17), therefore, is contrary not only to the uncontradicted evidence but also to the specific opinion of the trial judge.

B. The doctrine of res ipsa loquitur did not apply.

Because petitioner used the greatest possible care in minimizing the emission of fluorides from its plant and no injury to human beings from the amounts of fluorides emitted was remotely foreseeable, as a matter of law, petitioner was not negligent in operating the Troutdale plant. It follows, therefore, that petitioner's motions for a directed verdict made at the close of respondents' case in chief and renewed again after the parties had rested should have been granted. This the

trial court refused to do on the ground that respondents were entitled to the benefit and evidentiary aid of the doctrine of res ipsa loquitur. *Martin v. Reynolds Metals Company* (D. Or., 1952) 135 F. Supp. 379. The Court of Appeals also concluded that, by reason of the substantive law of the State of Oregon, the doctrine was applicable to these cases (infra, p. 114). The portion of the opinion of the Court of Appeals on this point is very confusing inasmuch as there is a failure to treat separately two different questions:

> (1) Was the doctrine applicable so as to justify a denial of petitioner's two motions for a directed verdict?
>
> (2) Did the trial court properly instruct the jury on the subject of res ipsa loquitur?

At this juncture we are concerned only with the first question and not with the second. In this connection clearly the Court of Appeals misapplied the doctrine of res ipsa loquitur in such fashion as to eliminate the requirement that an action to be negligent must contain foreseeable potentialities of injury.

In Oregon the starting point of a discussion of res ipsa loquitur must be the two cases of *Ritchie v. Thomas* (1950) 190 Or. 95, 224 P. 2d 543, and *Gour v. Multnomah Hotel, Inc.* (1950) 191 Or. 45, 224 P. 2d 552. Between them these cases discuss exhaustively the earlier decisions and state the rule authoritatively.

From these cases and many more that could be cited, the following elements of res ipsa loquitur are plain:

(1) To apply, the physical thing that caused the injury must be in the exclusive control of the defendant.

(2) The accident must be "such as in the ordinary course of events does not happen, if those who have the management use ordinary care."

(3) Res ipsa loquitur "is never valid in the face of facts which adequately explain the occurrence," inasmuch as its function is only to permit an inference under certain limited circumstances when the actual facts are not shown by the defendant, who is in the best position to show them because of his physical control of the injury-inflicting instrumentality.

(4) The inference is a permissible one, which in the light of all the facts the trier of fact may use or not; its only function is to carry the plaintiff beyond a nonsuit for want of a direct showing of the manner in which the allegedly negligent act occurred.

1. *The requirement that the accident be "such as in the ordinary course of events does not happen, if those who have the management use ordinary care" was not satisfied.*

The opinion of the Court of Appeals (infra, pp. 114-121) indicates that it failed to consider whether or not the situation in the cases at bar involved an "accident

• • •"such as in the ordinary course of events does not happen • • •." Yet this requirement must be satisfied. *Gow v. Multnomah Hotel, Inc.*, supra, p. 25, at 52, 224 P. 2d, at 554. The word "accident" itself implies an unexpected or unforeseen event happening suddenly and violently. Thus, decisions concerning industrial accident claims have held that a disease caused by the inhalation of impure air over a period of time does not result from an "accident." *Smith v. International High Speed Steel Co.* (1923) 98 N.J.L. 574, 120 Atl. 188; *Billo v. Allegheny Steel Co.* (1937) 328 Pa. 97, 195 Atl. 110, 114, 114; *Berkeley Granite Corporation v. Covington* (1937) 183 Ga. 801, 190 S.E. 8.

Not only must there be an accident, but also that accident must be such as does not ordinarily happen. It must have "occurred out of the ordinary course of events"; it must be "extraordinary in character." *Leathem Smith-Putnam Navigation Co. v. Osby* (CCA 7, 1935) 79 F. 2d 280, 283. It must appear, as the District Court itself said, that: "Something that ordinarily we would not expect to happen did happen and damage resulted." *Martin v. Reynolds Metals Company*, supra, p. 25, p. 381.

Here, there is no sudden, violent, unexpected event. The impact with which the fumes and gases hit the atmosphere hardly constituted violence, nor were the

emanations unexpected. Furthermore, even if some agile imagination could conceive of this process of emanation as an "accident," there is absolutely no ground for thinking that it occurred "out of the ordinary course of events." Indeed, those emanations are inevitable products of the electrolytic manufacture of aluminum. The parties stipulated that, as long as the plant operates, emanation of fluorides is continuous (No. 14,990, R. 26; No. 14,991, R. 28; No. 14,992, R. 29).

It is for this very reason that res ipsa loquitur was held inapplicable in the only case which has ever been decided on facts comparable to those at bar. Actually, the facts were virtually identical with those presented here.

Kelley v. National Lead Co. (1948), 240 Mo. App. 47, 210 S.W. 2d 728, was an action by a man and his wife seeking compensation for personal injuries and property damage allegedly caused by gases, fumes and particles escaping from defendant's plant. Defendant was manufacturing oleum, also known as fuming sulphuric acid. As the court there noted (210 S.W. 2d. p. 732):

> "Not only is the production of fumes and gases inherent in the very nature of the process, but there is no known way of preventing it."

Although there was originally some confusion as to plaintiffs' theory, by the time the case was submitted to the jury (Ibid.)

> "this issue had been reduced to the question of whether defendant could have remedied or prevented the escape of fumes and gases from its plant, but negligently failed to do so."

Defendant appealed a failure to direct a verdict in its favor, and the court, finding no evidence of negligence, reversed. The doctrine of res ipsa loquitur failed to save appellees' verdict (210 S.W. 2d, p. 733):

> "In their brief in this court plaintiffs argue that their case was one for the application of the doctrine of res ipsa loquitur. It is clear, however, that they are wrong in such assumption. One of the essentials of a res ipsa loquitur case is that the happening complained of be such as in the ordinary course of things does not occur if proper care is exercised by those having the management or control of the instrumentality producing the injury. Pandjiris v. Oliver Cadillac Co., 339 Mo. 711, 98 S.W. 2d 969; Brown v. St. Louis County Gas Co., Mo.App., 131 S.W. 2d 354. In this case the evidence showed that the giving off of fumes and gases is inherent in the manufacture of sulphuric acid and oleum. In fact, oleum is known as fuming sulphuric acid. The mere circumstance of the giving off of fumes and gases may therefore not be said to bespeak negligence, or, in other words, to afford reasonable evidence, in and of itself, that such a consequence was attributable to the lack of proper care."

The criteria for the application of the doctrine are the same in Missouri as in Oregon. *Weisbrod v. Katz Drug Co.* (1949) — Mo. —, —, 223 S.W. 2d 97, 99; *Conser v. Atchison, T. & S. F. Ry. Co.* (1954) — Mo. —, 266 S.W. 2d 587, 590.

It is not clear how the District Court could hold res ipsa loquitur applicable to this case under these circumstances. As already noted, the District Court's own opinion concurs that something must happen which is outside the ordinary run of events. But nowhere does the opinion state what that something is in this case.

Even the trial court's opinion points up its own error. The court said res ipsa loquitur applies when "Something that ordinarily we would not expect to happen did happen *and damage resulted*" (see p. 27, supra, emphasis added). In this case the damage resulted, allegedly, from the fluorine emanations. But could those be the "something unexpected"? It has already been shown that they were inevitable in the normal course of events (see p. 11, supra). If the trial court's instruction was to be consistent with the purpose and statement of that doctrinal requirement, it would read: "Under the ordinary course of events it is unexpected that fluorine compounds would emanate from such a plant." Of course, that could not be said. The application of res ipsa loquitur by the District Court

was thus doctrinally unjustified, as the *Kelley* case so aptly showed.

Another matter which the Court of Appeals failed to consider in its opinion was the applicability of the doctrine of res ipsa loquitur to phenomenal, unique and unprecedented accidents. Of course, the courts have applied res ipsa loquitur only when an unusual accident occurs, because otherwise the occurrence would not make an act of negligence a more probable explanation than the absence of a negligent act. As a corollary, when the accident is so unprecedented that the common experience of men does not indicate even the *possible* causes, the jury cannot infer that it is more likely than not that the defendant committed a negligent act, and res ipsa loquitur may not be employed.

In *Gour v. Multnomah Hotel, Inc.*, supra, p. 25, and *Ritchie v. Thomas*, supra, p. 25, Justice Brand of the Oregon Supreme Court, making an exhaustive study of res ipsa loquitur, more than once quoted with approval an article by Dean Prosser, "Res Ipsa Loquitur in California," 37 Cal. L. Rev. 183. In that article Dean Prosser states (p. 195):

> "It is still true that where it is entirely clear that there is no basis of experience from which a reasonable man may conclude that negligence is a more probable explanation than any other, the court will hold the plaintiff has not sustained his burden of proof."

Judicial application of that principle is found in *La Porte v. Houston* (Cal., 1948) 189 P. 2d 544. There an automobile being serviced by defendant had lurched forward and struck plaintiff, even though the brakes had been set and the gears put in neutral. The court held res ipsa loquitur inapplicable, remarking that (p. 546) "the evidence is overwhelming that the phenomenon occurs so infrequently that it may be classified as one that had never been witnessed by the majority of mechanics."

Actually, petitioner admits—indeed, insists upon—the incongruity of applying such rule to this case. The emanation of fluorides is inevitable, hardly unusual and surely not phenomenal. It is regularly witnessed by everyone in the industry. But, if the court can overlook the inevitability of fluorine emanations and find the required "unusual occurrence" in the unexpected injury, then petitioner can point, with equal validity, to the fact that this sort of injury had never before occurred in this country (see pp. 17-24, supra). Employing the District Court's own formulation, incongruous as it is, res ipsa loquitur cannot apply because, in Dean Prosser's words, "there is no basis of experience from which a reasonable man may conclude that negligence is a more probable explanation than any other."

Finally, it is apparent that both the trial court and the Court of Appeals, in holding that the doctrine was applicable, left out the requirement that the accident be such as would not happen *if ordinary care is used*. Thus, in denying petitioner's motion for a directed verdict, the trial court made the following astonishing statement as set forth in its published opinion (135 F. Supp. 382):

> "At this state of the case, there being no exculpatory explanation of how it happened it seems to this Court that it falls directly within the res ipsa loquitur doctrine which is quoted very simply in this statement from the Suko case, supra • • • if we would just paraphrase the language, and I will make an attempt to do so. *When the plaintiff proved the evanation of fluorine compounds from the plant of the defendant and the injury suffered by him as a result thereof, he made out a prima-facie case of negligence on the part of the defendant.*" (Emphasis added).

It is apparent from this statement what the Court left out in applying res ipsa loquitur. It left out the requirement that the accident be such as would not happen *if ordinary care is used*. Compare this with the statement in *Ritchie v. Thomas*, supra, p. 23:

> "An inference of negligence may arise only • • • when the accident is such as, in the ordinary course of events does not happen, if those who have the management use ordinary care." (224 P. 2d 551).

and with the statement of the Oregon Supreme Court in *Suko v. Northwestern Ice & Cold Storage Co.* (1941) 166 Or. 557, 566, 113 P. 2d 209, 213:

> "In the ordinary course of matters the mishap would not have occurred except through *carelessness* in the construction, inspection or use of the tank." (Emphasis added)

By omitting the final clause of this element of res ipsa loquitur, as quoted from *Ritchie v. Thomas*, supra, the Court has entirely perverted its meaning. It would be hard to phrase a clearer statement of absolute liability.

In considering this matter, the Court of Appeals recognized that "someone's negligence" was "a prime condition for the application of the so-called rule of res ipsa loquitur" (infra, p. 114). However, at no place in its opinion is there a reference by the Court of Appeals to the error contained in the foregoing statement of the trial court. Instead, the Court of Appeals states that the trial court had the particular requirement of negligence in mind because

> "* * * it stated in its instruction to the jury that 'under the ordinary course of events it is unexpected that persons being in the vicinity of such a plant would be injured or harmed by fluorine compounds emanating therefrom.' " (infra, p. 119).

This conclusion of the Court of Appeals is meaningless. If the trial court did not have the requirement of negligence in mind in denying petitioner's motion for a directed verdict as shown by the above exerpt from its published opinion (supra, p. 33), then of what significance is it that the trial court was considering this requirement in giving its instruction to the jury? Moreover, the instruction in question omitted the very requirement that the accident be such as would not happen *if ordinary care is used*. Compare again the statement in *Ritchie v. Thomas*, supra, p. 25, 190 Or. 114:

> "An inference of negligence may arise only when injury is caused by an instrumentality which is under the control and management of the defendant, and when the accident is such as, *in the ordinary course of events does not happen, if those who have the management use ordinary care.*" (Emphasis added)

with the comparable wording of the instruction by the trial court:

> "Further, that *under the ordinary course of events it is unexpected* that persons being in the vicinity of such a plant would be injured or harmed by fluorine compounds emanating therefrom, and that such a mishap would not occur." (R. 1880). (Emphasis added)

Thus the trial court in effect said, if an event is merely expected, res ipsa loquitur applies, but the rule is that,

if an event is unexpected *in the absence of negligence*, res ipsa loquitur applies inasmuch as the happening of the event unexpected in the absence of negligence permits an inference of negligence.

If an event merely unexpected allows an inference of negligence, an absurd result is reached. The more careful one is, the less an injury is to be expected. Thus, where the most careful act produces the least expected injury, under the court's reasoning the inference of negligence is strongest.

Perhaps recognizing the defectiveness of the rather elliptical reasoning of the trial court, the Court of Appeals set forth in its opinion certain premises which it believed related to ordinary care and warranted a conclusion that res ipsa loquitur applied (infra, p. 11):

> "Viewing plaintiffs' case in the most favorable light, as we are required to do, we have the following: (1), Damage to persons in the position of the Martins was possible from 'excessive amounts' of fluorides; (2), the Martins were poisoned and from this plant and by these fluorides; (3), from this it is permissible to infer that 'excessive amounts' reached them — that there were such excessive amounts; (4), the emission of excessive amounts from the plant was circumstantial evidence of negligence. Res ipsa loquitur."

The faultiness in this reasoning is obvious. First, the Court of Appeals confused the effect of the "invasion of excessive amounts of fluorides on human beings" with "excessive amounts of fluorides emitted from an aluminum reduction plant."

Second, the word "excessive" at least implies that the Troutdale plant emitted more fluorides than such plant would in the ordinary course of events emit. Such implication is not supported by the record. According to the uncontradicted testimony in this case, the fume collection systems in operation at the plant during the period in question were unique and unsurpassed in performance by any system in the aluminum reduction industry (supra, pp. 10-17).

Furthermore, as already shown, it was not remotely foreseeable that the fluorides emitted from the plant would cause injury to residents in the area (supra, pp. 17-21). Of course, without foreseeability there can be no negligence.

2. *The evidence was uncontradicted as to the cause of respondents' alleged injuries.*

As previously noted (supra, p. 26), res ipsa loquitur "is never valid in the face of facts which adequately explain the occurrence." With respect to this feature of the doctrine as applied to the instant cases, the trial court

made the rather incredible statement (135 F. Supp. 382):

> "So far as I am able to ascertain from the record no attempt has been made by the defendant to prove the cause of the emanation or the escaping of the fluorine compounds * * *."

The statement of the Court of Appeals on the same subject is even more astonishing (infra, p. 115):

> "Just what caused this not-ordinarily-to-be-expected scattering of fluorides in 'excessive amounts' was not specified. That they were so scattered the jury was warranted in finding. What concerns us here is that the trial judge was justified in paraphrasing the language of the Suko case, (supra, note 8): 'In the ordinary course of matters the mishap would not have occurred except through carelessness. . . .' Whether this want of care was in faulty construction, faulty inspection, or faulty operation of the fluorides elimination system, plaintiffs were not required to show, for wherever the fault lay, it was necessarily that of the defendant which had exclusive control."

Certainly fluorides settled upon real properties were "scattered," to use the word of the Court of Appeals. However, there were no "excessive amounts" as already shown (supra, p. 22). In fact, the "scattering" was "not-ordinarily-to-be-expected" in that the amounts "scattered" were far less than would ordinarily be expected (supra, p. 10).

Furthermore, the Court of Appeals is wrong in suggesting that the trial court paraphrased the language of the *Suko* case to read as follows:

> "'In the ordinary course of matters the mishap would not have occurred except through carelessness. . . .'"

As previously noted (supra, p. 35), the quoted statement is from the trial court's *instructions* and not from its *opinion* in denying petitioner's motion for a directed verdict. Also, the trial court made no reference to "carelessness" in giving the instruction in question but merely stated (R. 1880):

> "Further, that under the ordinary course of events it is unexpected that persons being in the vicinity of such a plant would be injured or harmed by fluorine compounds emanating therefrom, and that such a mishap would not occur."

As far as the cause of the "scattering" or "escaping" of the fluorides, a considerable part of the record is devoted to nothing else. The whole truth as to how and why fluorides escaped was known, and it is recited in detail in Point I-A-1. These facts were largely stipulated, as is shown by the instructions to the jury (R. 1870-3). There was simply no area in which an inference as to negligence could work. The question was entirely

whether the stated facts as to how and why fluorides escaped amounted to negligence. Petitioner, as has been shown, used the greatest possible care, far above that required by any reasonable risk of human injury. Moreover, since no injury was foreseeable, there could not have been negligence.

Res ipsa loquitur is by its nature appropriate only when some sudden, unexplained event occurs under the control of the defendant and causes injury. Here the event, the emission of fluorides, is fully explained. The only thing not explained is how the respondents could have suffered injury from something harmless to the rest of mankind. Petitioner was in no position to explain this, and certainly no inference was proper that fluorides caused the injury in the absence of some other explanation.

3. *Even if res ipsa loquitur applied, petitioner rebutted the resulting inference by uncontradicted testimony of due care.*

Res ipsa loquitur is a permissible inference. It is not mandatory and may be rebutted by a showing that the defendant exercised all due care. *Judson v. Bee Hive Auto Service Co.* (1930) 136 Or. 1, 14 [illegible] Pac. 585, 297 Pac. 1050, 1053-1054. *Dunning v. Northwestern Electric Co.* (1949) 186 Or. 379, 429, 206 P. 2d 1177,

1191; *Clark v. United States* (D. Or., 1952) 109 F. Supp. 213, 221. Because res ipsa loquitur is merely an inference and can be overcome by uncontradicted direct evidence, the quoted principle could be applied to a case in which res ipsa loquitur operates. *Gow v. Multnomah Hotel, Inc.*, supra, p. 25, at 53, 54, 224 P. 2d, at 555.

The principle should be applied to the cases at bar. Even if res ipsa loquitur could have been operative, it merely carried respondents past nonsuit. Petitioner, as shown previously (see pp. 17-24, supra), introduced uncontradicted evidence that it could not have foreseen injury to respondents and took every precaution to guard against known hazards. The only reasonable deduction that can be made from the evidence is that petitioner was not negligent. Therefore, in spite of res ipsa loquitur, the trial court should have directed verdicts for petitioner at the close of all the evidence.

With respect to this feature of the case, the Court of Appeals stated as follows (infra, p. 116):

> "* * * In the present case the jury might have accepted defendant's proof and explanation but obviously it did not. It was not obliged to do so. The procedural problem which faces any defendant such as this, as it has developed in the cases, is discussed at some length by both Prosser and Harper & James. The latter say, (§19.12) 'Defendant in a res ipsa case may show by evidence how the accident happened, but ordinarily this does not entitle him to a

> directed verdict. The jury may still reject the evidence or find that the explanation does not preclude the likelihood of negligence. . . . In most res ipsa loquitur cases defendant cannot definitely explain the accident. His usual defense consists of proof of the precautions he did take in constructing, maintaining, and operating the injuring instrumentality. Once in a great while such proof may conclusively show that the accident did not in fact happen, or that it was not caused by defendant. But this is seldom the outcome. And where it is not, defendant is in this dilemma: the less effective his precautions to prevent the occurrence the more apt they are to appear negligent; the more effective the precautions testified to, the less likely they are to have been taken in this case since the accident did happen."

Of course, what the jury in the cases at bar did or did not do has no effect on the obligation of the trial court to direct a verdict if the evidence so required it. In addition, the quotation by the Court of Appeals from Harper & James is of no value here. The uncontradicted evidence in this case, most of which was included in the stipulated agreed facts portion of the pre-trial order and the testimony introduced by *respondents*, showed the efficiency of the fume collection system, the amounts of fluorides captured, and the amounts of fluorides emitted. If the "accident did happen," that fact in these cases would not even suggest, in view of the foregoing, that "the precautions testified to" were not "taken."

The Court of Appeals also quotes in a footnote a statement by Professor Prosser:

> "Prosser discusses the same matter (pp. 216-217) as follows: 'But if the defendant merely offers evidence of his own acts and precautions amounting to reasonable care, it is seldom that a verdict can be directed in his favor. The inference from the circumstances remains in the case to contradict the evidence. If he testifies that he used proper care to insulate his wires, to inspect his chandelier, to drive his bus, or to keep defunct mice and wandering insect life out of his bottled beverage, the fact that electricity escaped from the wires, that the chandelier fell, that the bus went into the ditch and the bug was in the bottle, with the background of common experience that such things do not usually happen if proper care is used, may permit reasonable men to find that his witnesses are not to be believed, that the precautions described were not sufficient to conform to the standard required or were not faithfully carried out, and that the whole truth has not been told. It is of course not impossible that proof of proper care may be so overwhelming as to call for a directed verdict, but in the ordinary case it will not be sufficient to destroy the inference from res ipsa loquitur.'"

Petitioner has no quarrel with the substance of Professor Prosser's statement. However, the statement is relevant only when the doctrine of res ipsa loquitur is applicable to a case. Thus, if the doctrine of res ipsa loquitur is not applicable, a motion for a directed verdict should be granted when plaintiff, as here, introduces no

evidence of negligence on the part of defendant, or when, as here, the defendant's uncontradicted evidence shows the defendant is not negligent.

On the other hand, if the doctrine of res ipsa loquitur is applicable, which petitioner does not concede, it cannot be contradicted or overthrown by the type of evidence cited by Professor Prosser. The type of evidence that will contradict or overthrow the doctrine is set forth by Professor Prosser in the paragraph preceding that quoted by the Court of Appeals:

> "* * * If the defendant proves definitely by uncontradicted evidence that the occurrence was caused by some outside agency over which he had no control, *that it was of a kind which commonly occurs without negligence on the part of anyone, or that it could not have been avoided by the exercise of all reasonable care*, the inference of negligence is no longer permissible, and the verdict is directed for the defendant. The res ipsa case has been overthrown by showing that it is not a res ipsa case." (Emphasis added)

The following cases support the italicized portion of the above quotation: *Engelking v. Carlson* (1939) 13 Cal. 2d 216, 88 P. 2d 695, 697; *Oliver v. Union Transfer Co.* (1934) 17 Tenn. App. 694, 71 S.W. 2d 478, 480; *Bollenbach v. Bloomenthal* (1930) 341 Ill. 539, 173 N.E. 670, 672; *Tavani v. Swift & Co.* (1918) 262 Pa. 184, 105 Atl. 55, 56; *Richards v. Oregon Short Line R.*

Co. (1912) 41 Utah 99, 123 Pac. 933, 937; *Ryder v. Kinsey* (1895) 62 Minn. 85, 64 N.W. 94, 95. The uncontradicted evidence in this case is that fluorides escape from all aluminum reduction plants and that this is the kind of occurrence "which commonly occurs without negligence on the part of anyone." This conclusion is supported by the references in the record to aluminum reduction plants throughout the United States and Europe and by the reference to the Troutdale plant in *Davidson, et al, v. Reynolds Metals Company* (W.D. Wash., S.D., 1954) 125 F. Supp. 481; affirmed per curiam (CA 9, 1956) 236 F. 2d 224; cert. den. (1957) 352 U.S. 968, 1 L. Ed. 2d 323, where Judge George H. Boldt, in denying damages for alleged injuries to cattle for the period 1948 to 1953, stated (pp. 482-483):

> "* * * In both plants aluminum is produced by processes which *unavoidably* cause gases, fumes and airborne particulates to be formed, some part of which are discharged into the atmosphere from the plant stacks. The effluence contains fluorides in some form and amount * * *.
>
> "* * * Whether the measures taken by defendant to minimize the escape of fluorides from its plants are the maximum possible consistent with practical operating requirements is yet to be determined, but apparently American industry has not yet developed anything better." (Emphasis added)

The evidence is also uncontradicted that the escape of fluorides from the Troutdale plant was an occurrence

which "could not have been avoided by the exercise of all reasonable care" for the following reasons:

(1) As noted, the manufacture of aluminum "unavoidably" causes fluorides to be formed.

(2) The fume control system installed by petitioner before it commenced operating the Troutdale plant was "the then best developed washing system," "it was the best available" being used by the industry, "at that time there was no better control system in any other aluminum plant in the United States" and there was no control system operating in any aluminum reduction plant with a higher operating efficiency (R. 440-441; 1160, 1278).

(3) The foregoing control system was replaced by a system which captured 90 per cent of the fluorides otherwise escaping. The details concerning the design and installation of this second system have already been discussed. No other aluminum plant in this country had or has such a system (R. 1530).

It follows, therefore, that the inference of negligence arising from the trial court's mistaken application of the doctrine of res ipsa loquitur was not permissible in these cases because of petitioner's uncontradicted evidence. Accordingly, it was incumbent upon the court to direct verdicts in favor of petitioner.

II

The decision of said court that the scope of examination before trial of two of respondents' physicians was properly limited is in conflict with the applicable law of the State of Oregon.

Soon after the commencement of these actions, petitioner served written interrogatories on each of the respondents, pursuant to Rule 33 of the Federal Rules of Civil Procedure. Those interrogatories were duly answered (R. 8-13). Subsequently, petitioner took each respondent's deposition pursuant to Rule 26 of the Federal Rules of Civil Procedure (R. 1902-2018). It appeared from some of the respondents' testimony that Paul and Verla Martin had consulted Dr. Ralph Hills and a Dr. Proctor, both of Johns Hopkins Hospital, Baltimore, Maryland, in connection with their claimed injuries (R. 1954-6, 1998-9, 2001-2, 2004-6). Apparently Paula Martin Yturbide had consulted neither doctor (R. 1920).

Petitioner thereafter sought to take the depositions of Doctors Hills and Proctor. Respondents moved under Rule 30 (b) of the Federal Rules of Civil Procedure to have the depositions canceled, or, alternatively, to have the scope of examination limited to matters not privileged. The Court held that information possessed by Dr. Hills and Dr. Proctor was privileged under Oregon

law and that the privilege had not been waived. Therefore, it excluded from the scope of examination any privileged matters (No. 14,991 and No. 14,992, R. 11-21, 53, 55).

Petitioner opposed the motion on the ground that Mr. and Mrs. Martin had previously waived their privilege with respect to such information; that they had voluntarily opened the subject of their physical condition by disclosing their consultations with numerous physicians, including Dr. Hills and Dr. Proctor, and by cataloguing the alleged injuries and symptoms which prompted these consultations.

A. Respondents Paul Martin and Verla Martin waived their privilege to object to the examination of Doctors Hills and Proctor.

Prior to the respondents' motion, Paul Martin had fully testified concerning his physical condition. In answer to Defendant's Interrogatories Numbers 5 and 6 (No. 14,992, R. 11), and in his deposition (R. 198-3-4), he had described all his large catalog of symptoms and alleged injuries.

Rule 26 (b) of the Federal Rules of Civil Procedure permits examination of the deponent regarding "any matter, not privileged," which is relevant to the subject matter of the action. Because the law of the state in

which a federal court sits decides what matter is privileged, the United States District Court correctly referred to Oregon law. The Oregon statute provides: *ORS 44.040 (1) (d)*

> "A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action, suit or proceeding, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient."

Of course, the federal courts also look to state law to determine whether a party has waived his privilege, *Engl v. Aetna Life Ins. Co.* (CCA 2, 1943) 139 F. 2d 469, 470; *Munzer v. Swedish American Line* (S.D. N.Y., 1940) 35 F. Supp. 493.

The Oregon statute relating to waiver provides: *ORS 44.040 (2)*

> "If a party to the action, suit or proceeding offers himself as a witness, it is deemed a consent to the examination also of a * * * physician or surgeon on the same subject."

In *Forrest v. Portland Ry., L. & P. Co.* (1913) 64 Or. 240, 129 Pac. 1048, the Supreme Court of Oregon considered at length the application of this provision

in a personal injury action. All the facts had been stipulated except the damages.

Plaintiff testified to consultation with a Dr. Marsh, who was thereafter called as a witness by defendant. Plaintiff asserted her privilege, and the trial court barred Dr. Marsh from testifying, according to an offer of proof, to his negative diagnosis in plaintiff's case. That ruling was the sole ground of appeal. The Oregon Supreme Court reversed the judgment for the plaintiff, holding that plaintiff had waived her privilege. The Court held that the Oregon statute on waiver

> "gives legislative sanction to the common-sense reason that if a party of his own accord shall withdraw the privileged veil of privacy which, for his own protection, the law has placed around the relation of physician and patient, the whole matter is thereby set at large. * * * The subject under consideration as stated in the complaint and about which the plaintiff spoke herself as a witness was her physical condition, including a displacement of her uterus and injuries to her nervous system. When she testified on that subject, under the provisions of Section 734, L. O. L. [now ORS 44.040 (2), supra], she consented to the examination of her physician or surgeon on the same subject" (129 Pac. 1050).

The Court of Appeals was bound to apply the law of Oregon, thus formulated by the state's highest court. The Martins' depositions were "testimony," and, as deponents, they were "witnesses." *Rule 30 (*

Federal Rules of Civil Procedure. They certainly could have raised the privilege by objecting to defendant's interrogatories or to the examination on deposition. *Munzer v. Swedish American Line* (S.D. N.Y., 1940) 35 F. Supp. 493.

However, in its opinion of April 24, 1957, the Court of Appeals concluded that respondents Paul Martin and Verla Martin had not "offered" themselves as witnesses within the meaning of the provisions of ORS 44.040 (2) (infra, p. 91):

> "That is to say, the district court held it is the law of Oregon that [in] merely answering a question from her opponent which she might have avoided, [she] still remains the appellant's witness and does not constitute an *offering* of herself as a witness."

The striking fact is that of necessity this will be true in every personal injury action. By definition, the interrogatories are propounded by the defendant, and it will invariably be the defendant who wants to take the plaintiff's deposition. In effect, therefore, the court ruled that a plaintiff in a personal injury action can never waive this privilege in the course of the normal discovery procedure preceding trial.

This point has been settled in a federal case indistinguishable from the cases at bar. There the plaintiff,

in answering interrogatories, revealed a condition of mental disease. Later she objected when defendant sought the records of an institution in which she had been confined. The court held her privilege waived even though the waiver statute provided that the privilege must be "expressly waived." *Munzer v. Swedish American Line* (S.D. N.Y., 1940) 35 F. Supp. 493, 497, 498.

In its opinion of June 5, 1958, the Court reaffirmed its conclusion that respondents "had not offered" themselves as witnesses (infra, pp. 123-128). The Court also stated as follows (infra, p. 127):

> "At the time of the trial these witnesses did offer themselves as witnesses and at that time waived their privilege. At that time Drs. Hills and Proctor would have been proper witnesses. They were not then called, nor was the court at any time during the three weeks' trial asked for a continuance or an order modifying its earlier limitation to permit at the time an enlarged inquiry on deposition to be made of Drs. Hills and Proctor. Before the court could be put in error in respect to the taking of the testimony of these doctors, defendant must have asked to take the testimony *after* the privilege had been waived."

This statement is best answered by the remarks of Judge Chambers who dissented on this point (infra, pp. 129-130):

> "Here I think we do an injustice when we say to the defendant, During the course of trial you should have renewed your request to take the doctors' deposition; that is, have stopped the trial to do

it.' Ordinarily, that would be a useless right. With a jury one does not want to stop the main show to run off to a side show in Maryland. That has many perils, not the least of which is the urgency of courts to get on with their business. I would let a plaintiff restrict the taking of testimony on depositions at his own risk, if he should later offer to testify in the restricted area. And, as a trial judge, I would think it plaintiff's error, not mine."

B. The error was prejudicial to petitioner.

It is obvious that petitioner was prejudiced in being limited in its examination of Drs. Hills and Proctor. The existence, cause and extent of respondents' alleged injuries were directly in issue. A major part of the trial was devoted to the testimony of experts bearing on respondents' physical condition. Petitioner was entitled to the full benefit of the federal discovery procedure in making its case on these crucial issues.

Apart from the question of privilege, it was a proper case for discovery. By testifying that they had consulted Dr. Hills and Dr. Proctor with reference to the injuries in suit, respondents Paul and Verla Martin bore witness that the information in the doctors' hands was "relevant to the subject matter" of the action within the meaning of Rule 26 (b) of the Federal Rules of Civil Procedure.

There was much to indicate that information possessed by Dr. Hills and Dr. Proctor would have been

valuable in assessing respondents' true state of health. It is, in fact, significant that respondents called neither doctor as a witness during the trial. The Martins underwent a thorough check-up in the Johns Hopkins Hospital under the supervision of Dr. Hills. All the doctors who examined the respondents reported their findings to him. He also made his own general physical examination of the Martins (R. 1955, 2005). Yet petitioner was unable to ask Dr. Hills his diagnosis, the results of tests run at Johns Hopkins or his opinion of the cause of respondents' ailments, if any.

Similarly, Paul Martin testified that Dr. Proctor was a nasal specialist to whom he was referred by Dr. Hills. Dr. Proctor made an examination of his nasal condition and operated on his sinuses (R. 2006). Paul Martin claimed aggravation of sinus condition as one of his injuries, and he voluntarily disclosed Dr. Proctor's surgery. Yet petitioner was barred from discovering from Dr. Proctor his analysis of Paul Martin's condition and its causes.

Considering the importance of medical issues at the trial, the assured relevancy of the information withheld and its indicated importance, the order of the District Court prejudicially affected substantial rights of the petitioner.

III

The decision of said court that the claims of respondents Paul Martin and Verla Martin were not subject to the two-year statute of limitations of the State of Oregon is in conflict with the applicable law of the State of Oregon.

A. The actions of Paul and Verla Martin were subject to the Oregon two-year statute of limitations.

The District Court was bound to apply the Oregon statute of limitations and the constructions placed thereon by the Oregon courts. *Ragan v. Merchants Transfer & Warehouse Company* (1949) 337 U.S. 530, 69 Sup. Ct. 1233, 93 L. Ed. 1520; *Guaranty Trust Company v. York* (1945) 326 U.S. 99, 65 Sup. Ct. 1464, 89 L. Ed. 2079.

The two-year Oregon statute of limitations governs these actions.

ORS 12.010

> "Actions at law shall only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute."

ORS 12.110

> "An action * * * for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; * * *."

B. No jury question was involved in determining whether the actions were barred.

Respondents filed these actions on June 7, 1952. Thereafter, when their depositions were taken, respondents testified at length to the symptoms which they claim to be evidence of their fluorosis. Paul Martin testified in his deposition that by the end of 1948 he had acquired all the 14 symptoms he claimed (R. 1984-93) except a lump in his breast, which he said appeared only two months before his deposition was taken (R. 1991-3). He confirmed this testimony on the witness stand (R. 673-4, 710).

Similarly, Verla Martin testified that by 1948 she had acquired all 12 of the symptoms listed in her deposition (R. 1934), except face lesions, which she said appeared only two months before her deposition was taken (R. 1939-40). This testimony also was confirmed at trial (R. 811).

Because it appeared that up to the time her complaint was filed Paula Martin Yturbide was a minor as to whom the limitations period did not run, petitioner did not move for a directed verdict against her on this ground.

As to Paul and Verla Martin, however, petitioner asserted as the first ground of its motion for a directed verdict that their claims were barred by the statute of

limitations as a matter of law (R. 957, 1862-3). The District Court denied petitioner's motions on this ground, holding that a jury question was presented (R. 959, 1864).

With one exception, every question presented by petitioner's argument was a legal, and not a factual, one. What was the applicable statute? Upon what occurrence did the alleged causes of action accrue and the limitations period begin to run? Those questions were clearly legal questions for the Court.

Petitioner contended that the claims accrued when the Martins had become aware of their symptoms. The only factual question was when that had occurred. And this, though it was a factual issue, was not a jury question in this case. There was no evidence of any kind from which a juror could have reached any conclusion except that the Martins had become aware of their condition during 1948. The only relevant evidence anywhere in the record is the Martins' own testimony. Under these circumstances, the single fact involved was established as a matter of law.

Petitioner sought to test a legal theory. If the motion was erroneous in law, it was for the Court to say so. It could not abdicate that decision to the jury, and it erred in passing off a clear-cut controversy of law as a nonexistent dispute of fact.

C. The alleged causes of action accrued more than two years prior to suit when respondents first became aware of their symptoms.

An action for personal injuries suffered through the continued inhalation of vapors and gases must be brought within two years after the cause of action accrues. The cause of action accrues when the injured person first becomes aware of his pathological symptoms, whether or not he then realizes the full extent of his injuries.

In *Piukkula v. Pillsbury Astoria Flouring Mills Co* (1935) 150 Or. 304, 42 P. 2d 921, rehearing denied (1935) 150 Or. 304, 44 P. 2d 162, the plaintiffs were the widow and minor son of John Piukkula, who had allegedly died of an occupational disease contracted while in defendant's employ, through continued inhalation of flour dust in defendant's plant. The plaintiffs' cause of action for death was held to be maintainable only if Piukkula had had a cause of action against defendant at the time of his death. He had no cause of action, the defendant contended, because he was barred by the Oregon two-year statute of limitations. Piukkula had, in fact, instituted an action on June 8, 1933. Hence the decisive question was whether his cause of action had accrued more than two years prior to that date

The Oregon Supreme Court, through Judge Rossman, posed the question as follows:

> "We come now to the problem of determining when Piukkula's cause of action accrued: August 28, 1929, when he entered defendant's employ; September 17, 1930, when he experienced difficulty in breathing; January, 1931, when he, for the last time, worked for the defendant; or January 22, 1933, when he, for the first time, realized the extent and seriousness of his ailment?" (42 P. 2d 927)

Plaintiffs argued for the last date, January 22, 1933, contending that "when the injury takes the form of an occupational disease 'the statute of limitations does not begin to run until the workman's condition of health becomes so serious that he realizes the extent of his disease'" (42 P. 2d 927).

The Court rejected this theory and held that Piukkula's action had been barred. It concluded that on September 17, 1930, when Piukkula became aware of the symptoms of his injury, his cause of action accrued and the limitations period began to run. The Court said:

> "The plaintiff does not charge that the defendant in any way concealed anything concerning the purported ailment. We are not called upon to determine the precise moment when the tortious act occurred. The complaint alleges that on September 17, 1930, more than two years before Piukkula filed

his complaint, he experienced difficulty in breathing and, upon the advice of a physician, left the defendant's employ to pursue other work in the out-of-doors. If the defendant was responsible for the ailment of which Piukkula was then suffering, the ailment had already achieved substantial proportions and had inflicted upon him an appreciable injury. In other words, at that time, if the averments of the complaint are true, the defendant had breached a duty which it owed to Piukkula and the breach of the duty had resulted in an injury to him of which he was actually aware. It is evident from the foregoing that the application of the aforementioned principles requires a conclusion that the limitation period began to operate not later than September 17, 1930" (42 P. 2d 929).

Applying the court's language to the cases of Paul and Verla Martin, the only possible conclusion is that their suits were barred. By their own testimony, in 1948, more than two years before the filing of their complaints, they had experienced all of the symptoms summarized above. If the petitioner was responsible for the ailments from which they were then allegedly suffering, according to their own testimony those ailments had already "achieved substantial proportions and had inflicted upon them an appreciable injury." Therefore, their alleged causes of action accrued, and the limitations period began to run, not later than the end of 1948. Because their complaints were not filed until January 7, 1952, they were not filed within the two-

year limitations period. Hence, the claims of Paul and Verla Martin are barred by the applicable Oregon statute of limitations as a matter of law.

In its opinion of June 5, 1958, the Court of Appeals thought that the *Piukkula* case, supra, was "distinguishable from the present one" (infra, p. 122) because there Piukkula's exposure had ceased more than two years prior to the commencement of the action, whereas here respondents had been exposed to the condition complained of during a portion of the two-year period immediately preceding the filing of their actions. This distinction is clearly irrelevant. The criterion established by the Oregon Supreme Court in the *Piukkula* case, supra, for application to situations such as the instant one is when does the injured person become "actually aware" of the symptoms of his injury? At such time the statute of limitations commences to run. If the position of the Court of Appeals is sound, respondents could have continued to live in the area near petitioner's plant indefinitely, for a period even running into years, and the statute of limitations would not commence to run until they moved from the area or until the plant ceased operating permanently. Thus, if respondents remained in the area until 1968 and the plant operated during this period, the statute of limitations would continue to run until 1968 even though the symptoms complained of were apparent 20 years before.

The Court of Appeals also reached the conclusion that these actions were controlled by the rule laid down in two later Oregon cases (infra, pp. 122-123):

> "We think that that case is distinguishable from the present one, which would appear to be covered by the rule laid down in the later cases of Shives v. Chamberlain, 168 Or. 676, 126 P. 2d 28, and Hotelling v. Walther, 169 Or. 559, 130 P. 2d 944. Those were cases in which the plaintiff sought recovery for medical malpractice because of the alleged negligent treatment of the patient. In each case the treatment continued for a long period of time. It was held that the statute did not begin to run until the treatment was discontinued. In the first of these cases the court said: 'This continued treatment. . . . constituted a continuing tort causing the statute of limitations to start only when such treatment ceased.' (126 P. 2d 31) In the second case it was said: 'The alleged negligent treatment of the plaintiff must be considered as a whole. Plaintiff was not obliged to split his cause of action. The continued negligent treatment constituted but a single cause of action. Where the tort is continuing, the right of action is continuing. . . . The rule that the statute runs from the last date of the continuous negligent treatment is just and equitable.'" (130 P. 2d 946)

The rule derived from these two cases is not applicable to respondents' claims. In both, the Court noted that the limitations period would usually begin to run from the date the original harm was done. But the plaintiff could not be expected to file suit so long as he

thought the defendant physician was treating him and undoing the harm that had been done. On that basis only, the Court was willing to postpone the running of the statute until the treatment ceased and plaintiff could no longer expect the defendant to cure him. The court created a limited exception applicable only in the malpractice actions where it had its birth, and certainly of no relevance here.

CONCLUSION

Wherefore, in light of the vital importance to the public and industry in general of the issues here presented, the serious errors of law which petitioner believes to have been committed and the essential conflict between the views of the Court of Appeals as expressed in these cases with the applicable law of the State of Oregon, petitioner respectfully urges and prays that this petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

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APPENDIX

Part I

PAULA MARTIN, By and Through ARTHUR H. LEWIS, her guardian ad litem, Plaintiff,
v.
REYNOLDS METALS COMPANY, *Defendant.*

VERLA MARTIN, *Plaintiff,*
v.
REYNOLDS METALS COMPANY, *Defendant.*

PAUL MARTIN, *Plaintiff,*
v.
REYNOLDS METALS COMPANY, *Defendant.*

Civ. Nos. 6278-6280.
United States District Court
D. Oregon.
July 7, 1952.

EAST, District Judge.

This matter coming to the Court upon a motion for a directed verdict it is not the function of the Court to weigh the evidence. We must look at the evidence before us in the most favorable light to the plaintiffs and determine whether or not from that evidence, allowing all inferences that flow therefrom, reasonable men could reach a different conclusion.

Bearing in mind in these three cases the injury complained of is that of a personal injury as distinguished from injury to real or personal property, the Court cannot help but be struck by the fact that the so-called

doctrine of Rylands v. Fletcher[1] or the strict liability and ultra hazardous condition theories of liability generally refer to trespass on property as distinguished from person. There is one exception where this theory of liability is discussed and that is the Suko case[2] in Oregon. There a personal injury resulted but none of the mentioned theories of liability were adopted. There is one other factor that the Court wants to point out, and that is in the majority of these cases where strict liability as such is imposed, there is an apparent injury either to property or to person, a catastrophe of some nature has happened.

In the Ure against the United States case[3] that Judge Fee had, there was obvious damage to property by reason of the flooding of it. Here we have an alleged injury which is denied in its entirety, so, first of all, the jury has the question of fact of whether or not an injury did occur, so that complicates our search somewhat, but analyzing it we find simply this:

We have a situation where each of the plaintiffs claims that he received personal injury by reason of receiving into his system certain fluorine compounds which they claim originated within the plant of the defendant, became airborne and were deposited upon

1. L.R. 1 Ex. Ch. 265, affirmed: Fletcher v. Rylands (1868) L.S. 3 H.L. 330
2. Suko v. Northwestern Ice & Cold Storage Co., 166 Or. 557, 113 P.2d 209.
3. Ure v. United States (White v. United States), D.C.Or., 93 F.Supp. 779.

the lands upon which they worked and lived, in turn contaminating the air about them and the foods produced on their land.

The defendant is engaged in a perfectly legal use of its property, conducting thereon a recognized industry, namely, an aluminum reduction plant. It is stipulated by the parties that in the course of defendant's legitimate use of its property, that gases, fumes and particulates emanate into the atmosphere from said plant, consisting primarily of hydrogen fluoride, cryolite, calcium fluoride, iron fluoride and silicon tetrafluoride, which are in the form of gases, liquids and solids and are immediately diffused into the air, and that portions thereof have settled at various times upon the lands occupied by the plaintiffs. Furthermore, it is agreed by all the experts who appeared here that the majority of these compounds are toxic or poisonous, but the debate between the experts and the question the jury is going to have to determine, is at what point or quantity do these compounds become poisonous or are likely to become poisonous and harmful to humans. It is a matter of quantity or degree as they point out.

Plaintiffs contend that a sufficient quantity was deposited on their lands to cause them injury. The defendant denies that any such quantity did occur and further denies that they would receive the injury which they claim herein if it had been so.

Now can we say, in the face of these facts, that the defendant is necessarily engaged in a business which diffuses into the air poisonous objects such as we ordinarily refer to, poisonous matters that are inherently dangerous to human beings?

In trying to determine under what theory of liability, if any, this complex question of fact is to be submitted to the jury, we can only look to the authority we have in Oregon for guidance. We think the Oregon law is sufficient to guide us.

Let us first turn our attention to Judge Fee's decision in Ure v. United States, supra. Bear in mind that there the defendant was maintaining an irrigation canal which, the Court pointed out, had a certain rate of flow and a certain quantity of water and that if the dike broke it was bound to flow upon the land adjacent to the canal and particularly as it did when the canal bank broke, upon the lands of the plaintiff. The Court went fully into this question of strict liability and reviewed all the Oregon cases that bore upon it and ultimately Judge Fee reaches the conclusion that in that particular case he did not have to determine which theory of liability was applicable, but determines [61] F. Supp. 791] * * * "this is a trespass for which liability follows at common law and under the Oregon decisions."

"The defendant was handling a highly dangerous instrumentality in a position where the lands of plaintiffs were peculiarly exposed to peril, and was bound to exercise a degree of care proportionate to the injuries likely to result to others if the ditch did not hold the stream. When plaintiffs proved the collapse of the wall of the canal and the injuries suffered by him, he made out a prima facie case of negligence. 'A very high degree of danger calls for a very high degree of care, which, however, amounts to no more than ordinary care in such a case.' "

And there he lays emphasis upon the doctrine of the Suko case, supra. Now let us analyze the Suko case.

Recall in that case that defendant was engaged in a perfectly lawful enterprise of maintaining upon its roof a water tank. You can look across the skyline and see many of them. The tank burst and dropped a large quantity of water upon the plaintiff and adjoining land and he was personally injured. There it is hard to find any distinction between that case and the situation presented in Ure v. United States. The plaintiff is injured by water when it is in such quantity that it is in an inherently dangerous form. We do not quarrel with the proposition that an irrigation canal up above the land if it broke would certainly damage plaintiff's land, and most certainly if a water tank of the proportions involved in the Suko case, burst and dumped its whole load upon an individual some stories down that person was going to be injured.

But the Oregon Supreme Court, in the Suko case, did not adopt the so-called Rylands doctrine. They adopted the pure and simple rule of negligence with the test or measure of ordinary due care and gave plaintiff the benefit and evidentiary aid of the so-called doctrine of res ipsa loquitur. Here was an instrumentality that was in the exclusive possession and control of the defendant. Something that ordinarily we would not expect to happen did happen and damage resulted. This is the pure and simple test as the Court sees it, of res ipsa loquitur[4].

What do we have in our instant case? We have a defendant engaged in a perfectly legitimate and legal business, that of making aluminum. In the course of making that metal, there are, by reason of the electrolysis that is involved in the process, certain compounds developed, which by the action of the elements escape and are dispersed upon adjacent lands unless some type of control or collection is used. The evidence of the case shows a large quantity of fluorine solids or compounds escaped from the plant which had to be deposited on adjoining lands. These quantities diminished with instal-

4. "These instructions in our opinion violated one of the fundamental conditions permitting the application of the rule of res ipsa loquitur. That rule, amongst other things, is predicated upon the condition that the agency which has produced an injury is within the exclusive posession, control, and oversight of the person charged with negligence whence, legitimately, flows the inference that, if there is any explanation of the accident consistent with freedom from negligence, he ought to be able to give that explanation . . . ." Asheim v. Fahey, 170 Or. 330, at page 343, 133 P.2d 246, at page 251, 145 A.L.R.2d 861.

lation of increasing efficiency of controls. During the time involved in this case two systems of control or retention within the plant area of said compounds were installed by the defendant.

Now it develops to this point: If it is found by the jury that these fluorine compounds did leave the plant of the defendant and did become deposited on plaintiffs' lands to such an extent that they did receive into their systems these compounds and did become poisoned thereby and did suffer a personal injury, then that is a finding of the jury that relates back to a causation caused by the defendant and arising solely from its exclusive control and possession of the plant. At this state of the case, there being no exculpatory explanation of how it happened it seems to this Court that it falls directly within the res ipsa loquitur doctrine which is quoted very simply in this statement from the Suko case, supra * * * if we would just paraphrase the language, and I will make an attempt to do so.[5] When the plaintiff proved the emanation of fluorine compounds from the plant of the defendant and the injury suffered by him as a result thereof, he made out a prima-facie

5. "When the plaintiff proved the collapse of the tank and the injuries suffered by him as a result thereof, he made out a prima facie case of negligence on the part of the defendant. So far as we have been able to ascertain from the record, no attempt was made by the defendant to prove the cause of the bursting of the tank. Its effort was to show only that it was not at fault. It was a question for the jury, with all the evidence before it, whether the preponderance of such evidence was in favor of the plaintiff." Suko, supra, 166 Or. at pages 567 568, 113 P.2d at page 214.

case of negligence on the part of the defendant. So far as I am able to ascertain from the record no attempt has been made by the defendant to prove the cause of the emanation or the escaping of the fluorine compounds so it is a question for the jury with all the evidence before it whether a preponderance of such evidence is in favor of the plaintiff.

Without belaboring the matter any further, it is my thought that if and when the plaintiff has proved to the satisfaction of the jury by a preponderance of the evidence these existing facts which are claimed and outlined, then a prima-facie case of negligence is presented. That being so, it is an inference that the jury can take into consideration together with all the other evidence in the case in determining whether or not the defendant was negligent, and it thereupon became the duty of the defendant to come forward with evidence to show that it was not negligent.

The burden of proof never at any time shifts, it still being upon the plaintiffs. Nevertheless it would be for the jury to weigh such evidence as the defendant brings forward in connection with explaining the inference of negligence and to make an ultimate determination of where the evidence preponderates, so with that in mind the matter will be submitted to the jury on the theory of negligence if any, and the lack of ordinary

due care and caution on the part of the defendant with the aid in favor of the plaintiff of the rule of res ipsa loquitur as I understand it expressed here. With that in mind the motion for directed verdict on the second ground will also be denied.

Part II

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REYNOLDS METALS COMPANY, *Appellant*,
vs.
PAULA MARTIN YTURBIDE, *Appellee*.

No. 14,990
Apr. 24, 1957

Appeal from the United States District Court for the District of Oregon

Before: DENMAN, Chief Judge and POPE and CHAMBERS, Circuit Judges

DENMAN, Chief Judge:

Appellant, hereafter Metals Co., appeals from a judgment of the United States District Court of Oregon in a diversity suit awarding damages to Paula Martin Yturbide[1] for bodily injuries suffered by her from poisonous fluoride gases released in the air by Metals Co.'s aluminum plant in its process of reducing aluminum by electrolysis from aluminum oxide. The plant is located about one and a half miles from a farm, called Troutdale, where Paula resided with her parents, Paul Martin and Verla Martin, during the period from September, 1946, until November, 1950, while the gases were being emitted by a practically continuous operation of the plant.

1. The suit was commenced by Paula Martin, a minor, by her guardian ad litem. Before the trial she became of legal age and prosecuted the suit on her own.

Metals Co. makes various contentions of error by the trial court. Its Point I is that the evidence does not support an inference of negligence by the jury because "A. The appellant used the greatest possible care in minimizing the emission of fluorides. B. No injury to human beings from the amounts of fluoride emitted was remotely foreseeable. C. In the absence of foreseeability of any injury through emission of fluorides, as a matter of law there was no negligence."

The testimony of Mr. Zeh, chief chemist and control engineer of Metals Co., is that when the company took over the plant in 1946 it recognized the danger from the toxic effect of the fluoride gases and installed a system of sprays of water into the heated gases arising from the electrolic treatment of the ore. When they began operating, even with these sprays, 40% of the gases escaped into the air. As will be seen, this 40% amounted to very large figures of this poisonous material poured into the air.

The toxic gases arise from some 128 large pots 18 feet long, 6 feet wide and 2 feet deep. The total surface area of the pots is 13,824 square feet. Metals Co. does not claim that any other aluminum plant in the world is as large. Each pot normally contains 7,200 pounds of fluorides in molten condition, at a temperature in excess of 1,740° Fahrenheit. Fluoride compounds ema-

nate from the pots continuously. The materials added to the pots each day to retain the necessary quantity of fluorides for electrolytic purposes contained an average of five tons of fluorine.

The gases, fumes and particulates being evolved from the pots consist principally of hydrogen fluoride, sodium aluminum fluoride, calcium fluoride, iron fluoride and silicon tetra-fluoride, and are in the form of gases, liquids and solids, and are immediately diffused in the air and become air-borne and portions settle down upon the lands of the appellees.

The quantity of fluorides escaping from the reduction plant during the pertinent period amounted to well over a ton a day. The appellant company's chief chemist and control engineer, Harold Zeh, testified that the fluorine content of the fluorides escaping each day, for 1947, was 2,845 pounds; for 1948, 2,840 pounds; for 1949, 2,640 pounds.

That the jury could infer that Metals Co. realized the danger from this daily tonnage of gasses so released is apparent from the fact that during the entire four years it maintained at its plant an extraordinarily large laboratory with what must be a very high salaried staff, consisting of Mr. Zeh, Chief Chemist and Control Engineer; Mr. Hollis, Senior Chemist, and five analysts, for the sole purpose of dealing with fluoride contamination.

Mr. Hollis testified that at the time operation of the Troutdale plant commenced there were publications in the literature known to himself and others concerning the danger of these contaminations to human beings, and that the company had a library at the plant of such literature with the medical and veterinarian publications.

Hollis also testified that the poisonous gases would be absorbed into the body itself of plants, with which they came in contact in the air, and also that the ground would absorb the poisons and thus enter plant life as it absorbed its nourishment from the earth. The Martin family grew its own vegetables on their farm so exposed, which thus became contaminated.

The fluoride contamination committee, established in 1946 a series of stations called a grid system to study the extent of contamination of plant life. In 1946 it had 36 such stations, 14 of them on the farm of the Martins. By November, 1950, they had been increased to 45, later to 50. The jury well could infer that the continued and increasing use of those many stations to determine the toxic effect, indicated from the beginning a toxic condition so serious that the seven-man committee deemed it necessary to continue and increase its grids.

Further supporting the contention of negligence is the fact that not until the summer of 1950 did Metals

Co. seek the additional control of the escape of the gases. It then expended upwards of $2,000,000 by which it reduced the gas escape to all but 10% of the amount created. There is no showing that this reduction of 90% of the poisons released could not have been done at a much earlier date.

We think that the court did not err in denying the motion for a verdict for Metals Co. on the grounds above stated. The jury well could infer that the company fully realized the danger to mammals, including the human mammal, of releasing the toxic gases and hence it acted negligently in so doing.

We think that the doctrine of Fletcher v. Rylands also applies.

In Esson v. Wattier, 25 Or. 7, 11 (1893), the Oregon Supreme Court said:

> "Will the plaintiff sustain damage from back water either by overflow or percolation? In Fletcher v. Rylands, L.R. 3 H.L. 330, Mr. Justice Blackburn, in the court of Exchequer Chamber, thus illustrates a rule applicable in this case: 'If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril.'"

In Sharkey v. Portland Gas Co., 74 Or. 327 (1915), where a gas main operated by defendant company

broke, permitting the escape of gas which injured the trees of plaintiffs, the Supreme Court stated that "illuminating gas is a dangerous thing when it eludes control," and imposed upon the defendant the duty to control it, saying:

> "If the facts alleged in the complaint in this action are proved as laid, a prima facie conclusion of negligence would be imputed to the defendant as a matter of law.
>
> "Within the meaning of the precedents, a case was made by the plaintiffs sufficient to go to the jury when they showed that the gas escaped and that in consequence thereof, the trees were killed." 74 Or. at 332.

The rule continues to be recognized in Oregon. Mallett v. Taylor, 78 Or. 208 (1915); See also Brown v. Gessler, 191 Or. 503, 512 (1951) and Judge Fee's opinion in Use [sic] v. United States, 93 F. Supp. 779, 791 (D. Or. 1950).

Appellant contends that the court erred in the following instructions to the jury:

> "In determining whether or not the plaintiffs in these respective actions have met this burden of proof, they are entitled to, and you must consider, the rule or doctrine of the law of negligence, generally referred to as res ipsa loquitur, which merely means and is translated as, 'The thing speaks for itself.'"

Whatever other Oregon decisions may have said of this rule, the court's discussion of its effect makes the instruction not erroneous. That statement is as follows:

> "The plaintiffs' burden of proving negligence, if any, on the part of the defendant, by a preponderance of evidence, is not changed by this rule or doctrine just mentioned.
>
> "It follows, therefore, that in order to hold the defendant negligent, the inference of negligence referred to, if you find that that is applicable, and any other supporting evidence in the case must have greater weight, more convincing force in the minds of you jurors than the opposing explanation offered by the defendant to the effect that the defendant was not negligent. If such preponderance in plaintiffs' favor exists, plaintiffs have established negligence on the part of the defendant; but if it does not exist, if the evidence preponderates in defendant's favor, or if in your minds, there is an even balance as between the weight of the inference and any supporting evidence, and the weight of contrary explanation, neither having the more convincing force, then the defendant cannot be found negligent by you."

The Metals Co. further contends that there is no evidence from which the jury could infer Mrs. Yturbide was harmed by her exposure as a resident, to the escaped gases from the plant. Ten experts testified regarding the character of the gases. Five witnesses were introduced on behalf of Mrs. Yturbide, and at the same time on behalf of her parents, the separate suits of each

of the three persons being consolidated for trial. All these ten witnesses were heard viva voce by the jury, and hence the verdict can be supported if any one of the ten testified favorably to Mrs. Yturbide. It is not as the briefs of the appellant seem to suggest that we consider de novo the relative weight of the physicians" statements as between the parties.

There is abundant evidence supporting the verdict from one of her witnesses, Dr. Donald Hunter, internist and senior physician at the London Hospital, London, England, who has made a study of the diseases produced by such fluorides as came from the Metals Co. plant. These symptoms are those testified to by Mrs. Yturbide as follows: continued aching of the feet and legs, and back beginning in 1947 and continuing to the trial. After two years on the ranch there came a "popping" into her feet so loud that it was audible. She had very severe abdominal gas and bloating. Her urine scalded and burned her in passing, and she had to get up with great frequency during the night to urinate. She had trouble with her nose swelling so that she could hardly breathe and her ear aches with her ears becoming plugged up. Her hands perspired and swelled. If she sat down for long she would go to sleep and was always tired. All of these symptoms were present by 1948. Dr. Hunter described these symptoms as being well known

to be caused by a disease which he called subacute fluorosis.

Dr. Hunter added the testimony concerning the physical effects of such poisonous gases on material objects with which they come in contact. He was shown a piece of the glass of a window of the Martin house facing the plant and stated that:

> ". . . this is precisely the etched glass window that I saw in Lincolnshire on an ironwork in England when in 1946 a family like the Martin family was overcome with all the same symptoms as the Martins, which is not included in this monograph because it has nothing to do with the aluminum plant, but the effluent was the same thing, hydrogen fluoride and cryolite dust, aluminum fluoride, and even silico fluoride which are probably the worst of the lot; therefore, this accords with experience in other countries of effluent from factories where fluorine compounds are allowed to contaminate the atmosphere of places where people live."

Doctor Richard Capps examined Mrs. Yturbide for a week during which she was hospitalized. There he discovered the symptoms discussed by Dr. Hunter, plus a thyroid enlargement and a mottling of the teeth which could be caused by fluorosis. The doctor stated that the total of these symptoms showed infection by fluorosis and in answer to the question, "Could all of these things, Doctor, that you have described be explained on the

basis of any other diagnosis?" stated, "If it is, I haven't the slightest idea what it might be."

Both the physicians stressed the fact that the symptoms of all three members of the family were practically identical. We think there was sufficient testimony for the jury to infer that the disease disclosed by these symptoms was caused by the release of the poisonous gases from the plant.

The Metals Co. contends that the court erred in admitting evidence at the trial with respect to damage to cattle from the toxic gases being deposited on and impregnating the vegetation they ate. We can see no error in introducing this analogy of the effect on other mammals of the infected vegetation where the same infection to the Martins well may arise from eating the infected vegetables grown on their farm. The Oregon law leaves to the discretion of the trial judge the extent to which such analogies may be considered by the jury. Here there was abundant evidence of the difference between the digestive systems of the two mammals, and of the greater likelihood of cattle infection. Leaving the matter to the jury did not constitute an abuse of the wide discretion allowed to the trial court under the Oregon law. Tuite v. Union Pacific Stages, et al., 204 Or. 565, 590 (1955).

CROSS APPEAL OF MRS. YTURBIDE RESPECTING COSTS

Mrs. Yturbide appeals from an order of the district court limiting the award to her of costs for the travel expenses and subsistence of witnesses to expenses for travel for a distance of 100 miles from the place of trial. She urges that Section 1821, Title 28 U.S.C., which provides for the computation of the cost of travel allowed for witnesses contains no mileage limitation. Metals Co. correctly points out, however, that while no mileage limitation is contained in Section 1821, nor in Section 600c which was replaced by Section 1821, in 1948, courts have generally limited the application of both sections to the range of the subpoena power of the district court, that is, in civil cases, 100 miles from the place of trial under F.R.C.P. #45(e) (1). Kenyon v. Automatic Instrument Co., 10 F.R.D. 248, 251-2 (W.D. Mich. 1950); Barnhart v. Jones, 9 F.R.D. 423 (S.D. W. Va. 1949). It appears that the limitation is applicable to foreign as well as domestic witnesses. See Ludvigsen v. Commercial Stevedoring Co., 228 F.2d 707, 708 (Cir. 2, 1956).

We conclude that the trial court properly limited the allowable costs to 100 miles from the place of trial. This is a salutary rule: otherwise, a party might bring witnesses from great distances and, if successful, impose

upon his opponent costs which would render the expense of litigation, which is already great, prohibitive. The proper procedure in cases where witnesses are at great distances from the place of trial is to have depositions taken. F.R.C.P. #26.

The judgment and the order appealed from respecting costs are affirmed.

(Endorsed:) Opinion. Filed Apr. 24, 1957.

Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REYNOLDS METALS COMPANY, *Appellant,*	)	
vs.	)	No. 14,991
VERLA MARTIN, *Appellee.*	)	Apr. 24, 1957

Appeal from the United States District Court
for the District of Oregon

Before: DENMAN, Chief Judge and POPE and CHAMBERS, Circuit Judges

DENMAN, Chief Judge:

Appellant, hereafter Metals Co., appeals from a judgment of the United States District Court of Oregon in a diversity suit awarding damages to Verla Martin for bodily injuries suffered by her from poisonous fluoride gases released in the air by Metals Co.'s aluminum plant in its process of reducing aluminum by electrolysis from aluminum oxide. The plant is located about one and a half miles from a farm, called Troutdale, where Verla Martin resided with her husband, Paul Martin, and daughter, Paula Martin Yturbide, during the period from September, 1946, until November, 1950, while the gases were being emitted by a practically continuous operation of the plant.

This case was tried with that of Reynolds Metals Company v. Paula Martin Yturbide, the same evidence

applying to this and the third case, that of Paul Martin against the Reynolds Metals Company.

Only two contentions here made by the Metals Co. differ from those urged in the case of Paula Martin Yturbide, this day decided.

First, appellant contends that the claims of the two adult plaintiffs, Paul and Verla Martin, are barred by the Oregon two-year statute of limitations. Or. Rev. Stat. § 12.110. The Oregon law is applicable under the rule of Guaranty Trust Co. v. York, 326 U.S. 99 (1945). The present suits were filed in January, 1952. If, therefore, the statute of limitations began to run against the claims of Paul and Verla Martin prior to January, 1950, their suits are barred.

The period of appellees' exposure to the fluorides emanating from appellant's plant was from December, 1946, to November, 1950. Paul and Verla Martin testified, however, that almost all of their many symptoms had appeared before the end of 1948. Appellant bases its contention that appellee's claim is barred by the statute of limitations on the decision of the Oregon Supreme Court in Piukkula v. Pillsbury Astoria Flouring Mills Co., 150 Or. 304, 42 P.2d 921 (1935).

In that case, the statute of limitations question was when the period commenced to run against a workman

who suffered an occupational disease caused by his exposure to flour dust in a mill. The workman continued to work in the mill for some months after he became aware of the symptoms of the disease. The Oregon Supreme Court held at pages 325-6 that the statute began to run when the workman first experienced the symptoms of the disease. The injustice of this decision is obvious. If one continues to work for his living with the same exposure he would be prevented from recovering for his injuries for the period of his exposure within the two-year period of the statute.

We think the Piukkula case is overruled in two subsequent cases, Shives v. Chamberlain, 168 Or. 676 (1942), and Hotelling v. Walther, 169 Or. 559 (1942). Both of these were medical malpractice cases in which the treatment of the patient by the negligent physician continued for over two years after the acts constituting malpractice occurred. The court held in the Shives case, at page 689, that the conduct of the physician was a "continuing tort" against which the statute of limitations does not begin to run until the person ceases to be exposed to it. In the *Hotelling* case, supra, the court, at page 564, expressly repudiates a Massachusetts malpractice case holding that the statute begins to run when the negligent treatment first harms the patient. This same Massachusetts decision was cited with approval in the *Piukkula* case at page 324. Further, in the *Hotelling*

case, *supra*, the court, at page 564, cites with approval a New Jersey decision holding in a case involving an occupational disease that the statute begins to run from the last date of continuous exposure.

In neither of these Oregon cases is the ruling based on any confidential relationship of physician and patient but, as seen, entirely on the continuity of the tortious acts into the period of limitation.

Secondly, appellant further contends the court erred in refusing before the trial to permit questioning in depositions of Dr. Hills and Dr. Proctor, of Baltimore, Maryland, two of the physicians who examined and treated Paul and Verla Martin on information acquired "in attending" them. The federal courts look to the state law to determine whether the physicians bear a confidential relationship to their patients. Engl v. Aetna Life Insurance Co., 139 F.2d 469 (Cir. 2, 1943). The applicable Oregon statutes provide: Or. Rev. Stat. § 44.040(1) (d):

> "A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action, suit or proceeding, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient."

Or. Rev. Stat. § 44.040(2):

> "If a party to the action, suit or proceeding offers himself as a witness, it is deemed a consent to the examination also of a . . . physician or surgeon on the same subject."

Appellant contends that Verla Martin had "*offered*" herself as a witness because when made a witness by appellant by interrogatories submitted under F.R.C.P. 33 and questioned in a deposition taken by appellant under F.R.C.P. 26 in which her attorney sought no cross-examination, she had not availed herself of her privilege to refuse to answer questions concerning her treatment by two Maryland doctors but had testified concerning their treatment and advice.

Appellant's interrogatories were answered in March, 1952 and its questions in the deposition in May, 1952. Instead of attempting to take the depositions of these doctors promptly, it was not until two and a half years later when the case was set for trial on July 25, 1955, that appellant gave notice of taking of the doctors' testimony in Baltimore on July 16, 1955. Because of the expense to the Martins in sending a lawyer to Baltimore, Mrs. Martin moved for a ruling on the right to take her physicians' testimony and the district court ruled as follows:

"Reference is made to the plaintiff's objections to the taking of the depositions of Drs. Hill and Huntley in the State of Maryland now set for tomorrow morning. The Court has examined the defendant's *interrogatories* presented to the plaintiffs, and is of the opinion that their answers and statements (exclusive of Paula Martin) do not reveal either an expressed or implied waiver of their (Paul Martin and Verla Martin) right of privilege created by Sec. 44.040 ORS.

"Therefore, the depositions of said doctors, so far as questions and interrogatories relate 'to any information acquired (by either of the doctors) in attending the patient (either of the plaintiffs) which was necessary to enable him to prescribe or act for the patient,' is violative of plaintiff's mentioned privilege, and to that extent the objections should be sustaind." (Emphasis added.)

That is to say, the district court held it is the law of Oregon that merely answering a question from her opponent which she might have avoided, still remains the appellant's witness and does not constitute an *offering* of herself as a witness.

Appellant cites no Oregon case that holds to the contrary and our careful search discloses none. Appellant relies solely on the case of Forrest v. Portland Ry. & P. Co., 64 Ore. 240 (1913), where the court says that the plaintiff in seeking to establish the damages for her personal injuries "*offered herself as a witness*" and testified at length about the extent and nature of her in-

juries. There is nothing in the Oregon Supreme Court's opinion which remotely suggests that the plaintiff in that case was testifying as the defendant's witness as was Mrs. Martin here.

In this situation we cannot say from our own study of the law of Oregon that the district judge erred in applying the law of his own state, following the principles established by the Supreme Court in Henderson Co. v. Thompson, 300 U. S. 258, 266 (1937); Thompson v. Consolidated Utilities Corp., 300 U. S. 55, 74-75 (1937); Township of Hillsborough v. Cromwell, 326 U. S. 620, 630 (1945).

CROSS-APPEAL OF VERLA MARTIN RESPECTING COSTS

After awarding costs to Mrs. Yturbide in her case against the Metals Co., the trial court denied costs to appellants Paul and Verla Martin for travel and subsistence expenses of the same witnesses. Appellant Verla Martin argues that while these witnesses testified only at one trial on behalf of all three plaintiffs, yet they are entitled to costs separately because each action was separate, and they were joined only for convenience of trial. She argues that the rule announced by this court in National Union Fire Ins. Co. v. California Cotton Credit Corp., 76 F.2d 279, 289 (Cir. 9, 1935) permitting

the award of double costs where the cases of two plaintiffs against a single defendant were joined, was not affected by the repeal of the statute under which that case was decided and the adoption of F.R.C.P. #42(a) in 1938. This rule provides for the consolidation for trial of suits involving common questions of law or fact and that the court "may make such orders concerning proceedings therein as may tend to avoid unnecessary costs. . . ."

We think the disallowance of multiple costs is consonant with the purpose of the present rule 42(a). Admittedly, the only case cited to us discussing this question involved the consolidation of two cases between the same parties. Copeman Laboratories v. Norge Division, 89 F. Supp. 161 (S.D. Mich., 1950). In that case multiple costs were disallowed. The fact that in the present case there are different plaintiffs does not appear to us to require duplication of costs. Obviously the expenses of these witnesses were not trebled because the trial at which they testified involved the cases of three plaintiffs. The three plaintiffs paid these expenses only once; it is both unfair and unreasonable to multiply them by three in passing them on to the appellee.

The judgment and the order appealed from respecting costs are affirmed.

CHAMBERS, Circuit Judge, concurring and dissenting:

I concur in the foregoing opinion, except I dissent as to the specification on the matter of the testimony of the Baltimore physicians, Drs. Hill and Proctor. I think in the setting here the defendant was entitled to take their testimony at some time before the case went to the jury.

(Endorsed:) Opinion and Concurring and Dissenting Opinion. Filed Apr. 24, 1957.

Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REYNOLDS METALS COMPANY, *Appellant*,
vs.
PAUL MARTIN, *Appellee*.

No. 14,992
Apr. 24, 1957

Appeal from the United States District Court for the District of Oregon

Before: DENMAN, Chief Judge and POPE and CHAMBERS, Circuit Judges

Per Curiam:

This case was tried with the cases of Paula Martin Yturbide and Verla Martin against Reynolds Metals Company, and the issues presented herein are substantially the same as those in Reynolds Metals Company v. Verla Martin, this day decided.

For the reasons therein stated the judgment and the order appealed from respecting costs are affirmed.

(Endorsed:) Per Curiam Opinion. Filed Apr. 24, 1957.

Paul P. O'Brien, Clerk.

Part III

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REYNOLDS METALS COMPANY, *Appellant*,
vs.
PAULA MARTIN YTURBIDE, *Appellee*.
No. 14,990

REYNOLDS METALS COMPANY *Appellant*,
vs.
VERLA MARTIN, *Appellee*.
No. 14,991

REYNOLDS METALS COMPANY, *Appellant*,
vs.
PAUL MARTIN, *Appellee*.
No. 14,992

June 5, 1958

On rehearing appeals from the final judgment of the District Court for the District of Oregon.

EN BANC.—Before STEPHENS, Chief Judge, HEALY, POPE, LEMMON, CHAMBERS, BARNES and HAMLEY, Circuit Judges.

POPE, Circuit Judge.

In July, 1946, Reynolds Metals Company, a Delaware corporation, acquired through lease, an aluminum plant belonging to the Government and located at Troutdale, Oregon. It commenced operation of its first potline for the production of aluminum in September

of that year. In the operation of the plant chemical compounds containing aluminum were collected in the reduction cells of the so-called "pots" and were reduced or separated by the process of electrolysis or passage of current through the cell. In the process, temperatures up to 1775° F. were developed. As the compounds with which the cells were charged, (cryolite or sodium fluoride or calcium fluoride and aluminum fluoride) contain large percentages of fluorine ranging around 50 percent, a considerable portion of fluoride material was volatilized the process and reached the atmosphere.[1]

Shortly after the operation of the plant began, and in December, 1946, the appellees in these three appeals, Paul Martin, his wife, Verla Martin, and his daughter, Paula Martin, (now Mrs. Yturbide), moved to their cattle farm or ranch near Troutdale located about a mile to a mile and one-half from the aluminum plant, and they resided there until November, 1950. The law suits out of which these appeals grew were based upon claims that during the period of their residence on the farm they were poisoned by fluorides which originated at the appellant's plant and were borne on the air to the farm where they breathed these fluoride effluents claimed to be highly toxic and also ate vegetables

1. It took form in hydrogen fluoride, silicone tetratfluoride, sodium aluminum fluoride, aluminum fluoride, and cryolite. The fluorine, as such, is a gas which immediately combines with other elements to make these effluent compounds.

growing in their garden which also had been absorbing the same toxic elements.[2]

The principal question presented here is whether the evidence adduced at the trial below, (the three cases were tried together and upon the same evidence) was sufficient to permit the case to go to the jury. Upon the part of the appellant it is contended, (1) that there was insufficient proof to demonstrate that the damage to the persons of the plaintiffs, of which they complain, was caused by the fluorides escaping from defendant's plant; and (2), that there was no evidence of any negligence, or any other breach of duty, on the part of the defendant.

With respect to the question of causation:—whether the escaping fluorides did in fact cause plaintiffs' injuries,—the evidence was sufficient to warrant the jury's conclusion that the escaping fluorides were the cause of the injuries. It was not disputed, in fact it was stipulated, that "fluorides in some quantities and forms did escape, when the potlines of said plant were operating, from defendant's plant." The pre-trial stipulation, after stating the specific fluoride combinations which

2. From the Pre-Trial Orders: "Plaintiff contends that the poisonous fluoride compounds emanating from the plant of the defendant and carried by the prevailing winds upon and over, and settling upon, the lands upon which plaintiff resided and was present, were inhaled and were ingested by plaintiff, and said poisonous fluoride compounds rendered plaintiff permanently ill and caused plaintiff to suffer and to undergo serious and permanent personal injury.

did escape in the form of gases, liquids and solids, and which became air-borne, recited that "portions thereof have settled at various times upon the lands" of the Martins.

A horticulturist from the Oregon State College, in the years 1948, 1949 and 1950 made test samples of plants grown on selected plots in the vicinity of the Martin property, for the purpose of determining the fluorine content of such plants. Some of the test plots used were on the Martin property and as close as 1.1 miles from the aluminum plant. Others located in the same direction from the plant were farther away. Those plants tested on plots nearest the aluminum plant showed substantial amounts of fluorine content. The plants tested on plots which were farther away from the plant showed a substantially decreasing fluorine content, thus indicating that relatively speaking the nearer the aluminum plant the greater the concentration of the gases, fumes and particulates, (i.e. fine solids). In making such tests plants which readily absorbed fluorine compounds such as buckwheat and gladioli were used so as to facilitate the testing. The results therefore did not indicate the quantities of fluorine which would likely be found in garden vegetables such as those the Martins grew in their garden plot for their domestic use.

In general there was an absence of proof as to just what quantities of fluorides contained in these gases, fumes and particulates, passed over the Martin land or were inhaled by them or ingested from the garden vegetables eaten by them. There was, however, proof that these fluorides were toxic. One of the chemists who testified stated without challenge that hydrofluoric acid or hydrogen fluoride, one of the effluents from the plant, was "quite toxic" and that "the books on chemistry warned against inhaling it." Appellant concedes that such fluorides "are poisonous in excessive amounts."

That very large quantities of these gases, fumes and particulates, did leave the plant and were diffused into the air, was unquestioned. Appellant's own exhibits disclose that with the equipment which was used to control the escape of gases during the period that the Martins lived on their farm, hundreds of pounds of these effluents escaped each day. Thus in the year 1947 the amount of fluorine alone escaping per day from the plant averaged .2845 pounds. Comparable amounts escaped in the years 1948-49 and throughout the first half of 1950, after which time the appellant began the installation of a new control system which was much more efficient in arresting the escape and fall-out

There is no showing as to where these large quantities of effluents finally settled. The experiments mentioned above would indicate that the greater portion settled on those areas nearest the plant, and those areas included the Martin farm. That the effluents did have some degree of toxic or harmful effect was indicated by proof that cattle upon the Martin place showed damage from fluorosis. Generally with respect to cattle it does not appear to have been controverted that cattle damage from an aluminum plant is a fairly common phenomenon.[1]

Of course it does not follow from mere proof of some damage to cattle on the Martin place that the plaintiffs' physical injuries were due to excessive amounts of fluorides from the plant. Cattle get their whole food from grass and ingest large quantities. A human diet contains a relatively small proportion of vegetables. For the purpose of this opinion we assume that the evidence that cattle on the Martin place showed injury to health from fluorides has no significance here other than to show the fluorides did reach the Martin place in some quantity and that in some quantity the ingestion

[1] During the trial in examining witnesses counsel for defendant made frequent reference to a British Government publication entitled "Medical Research Memorandum No. 22 on Industrial Fluorosis and State of Hazards to Man and Animal near Ft. William, Scotland." This reports the result of a study of fluorosis affecting cattle and sheep near an aluminum factory. It reports with respect to such cattle grazing in the vicinity of the factory osteodystrophia, dental lesions, and "some cases of osteomalacia due to fluorine intoxication", also severe loss of condition and loss of milk in affected animals.

of affected plants may possibly cause illness in a mammal.[4]

A significant bit of testimony adduced was proof that glass in the Martin home became etched by acid, probably hydrofluoric acid which was one of the effluents from the aluminum plant. One of the expert witnesses, the British doctor who had some prior experience with similar etching of glass located near industrial plants abroad, testified that the glass from the Martin window which he was shown during the testimony was an indication of excessive quantities of fluoride contamination in the atmosphere.

Although the cases of the Martins are unique in that they were unable to produce either from medical literature or expert witnesses histories of persons situationed as they were, namely, persons not working in the plant but simply living outside and near the plant who developed symptoms similar to theirs in consequence of the fall-out of emanations from an aluminum plant (see footnote 5a infra) nevertheless they did pro-

4. Dr. Donald Hunter, British physician and a director of research in industrial medicine of the Privy Council Medical Research Council, which produced the memorandum No. 22 referred to in footnote 3, supra, testified as follows: "Q. Why, Doctor, are both cattle and animals as well as men, humans, affected by the effluents from an aluminum factory? A. Because fluorides—fluorine compounds are deadly poisonous to mamalian tissues and man is a mammal just as much as a cow or sheep."

Error is assigned on account of the admission of evidence of damage to cattle. Since, as here indicated, that evidence had only a limited significance, it cannot be said that its admission was error. It was admissible for the purpose here stated.

duce substantial medical testimony which did connect their disabilities and physical injuries with the fluorides escaping from the plant. Of course there was also testimony to the contrary, but the evidence adduced on their behalf, principally from the British medical expert referred in footnote 3, supra, and from a Dr. Capps, a Chicago specialist on diseases of the liver, was substantial, and in our view, fully worthy of credit. Dr. Capps had been consulted by the Martins in November, 1951; Dr. Hunter, the British expert, examined the Martins shortly before the time of the trial; he also reviewed the laboratory and other tests made with respect to them by Dr. Capps and by other physicians who had examined them. Theirs was not the only medical testimony adduced in support of the claims of the Martins, but it was probably the most complete. Their qualifications to testify was not only adequate but their experience with the subject upon which they testified was outstanding.[5] For the purposes of this opinion it is sufficient to say that the evidence clearly warranted the jury in accepting the testimony and conclusions of

[5] Dr. Hunter, a Fellow of the Royal College of Physicians, was director of a department for research of industrial medicine of the Medical Research Council, a public undertaking of the Privy Council. He had been called upon to give lectures in this field at medical schools and before medical groups throughout the world. Before testifying he had examined and reviewed the reports and tests made in 1951, particularly the liver efficiency tests to determine the damage to the cells in the livers of the Martins made by Dr. Capps whom Dr. Hunter referred to as "probably the world's greatest expert on this subject."

these doctors. Hence there is no point in undertaking to detail their testimony at length.[6]

The medical witnesses expressed confidence in their conclusions because of the fact that they found substantially the same symptoms in the three individuals, thus lessening the possibility that the symptoms were attributable to individual idiosyncracies. Neither one was able to testify as to the degree of concentration. how

6. Dr. Capps described Paul Martin's symptoms as follows: "In the first place he developed diarrhea, indigestion, and heartburn, and bloating, particularly after meals. Those symptoms all were referable to the intestinal tract. Secondly, he developed symptoms which we might refer to as skeletal symptoms: pain, particularly in his back, occasionally down the leg sufficiently severe so that he was unable to bend over and tie his shoes, for example, or even put his shoes on, as a matter of fact. These pains were aggravated by lifting and by various types of exertions. The third group of symptoms had to do with the respiratory tract, the lungs. He developed a dry cough and shortness of breath particularly on exertion. And, finally he developed frequency of urination particularly at night, to such an extent that—seven or eight times at night, and he was unable to sleep. These were, in brief, the symptoms which he complained of. And our observations in the hospital were directed towards trying to determine what those two groups were due to."

After detailing at length the process by which he arrived at a diagnosis of what caused these symptoms which included a diagnosis of fluorosis, (poisoning with fluorine), and toxic hepatitis, (toxic involvement of the liver), he stated his conclusion as follows: "In view, then, of this potential history of the exposure and in view of the fact that we were advised that we were faced with a rather bizarre group of symptoms—here is an involvement of a number of the symptoms in the body which was unusual and definitely bizarre, and it corresponds exactly to the description of published cases of fluorosis; furthermore, there is no other explanation. One can make another single diagnosis that would cover all of these symptoms. One could make four or five diagnoses, but, of course, that is always always a very poor thing to do. This is the picture of fluorosis. There is a history of the potential exposure. We are unable to find any explanation after careful search, and under those circumstances one is justified, and not only justified, but you are forced to make the diagnosis of poisoning with fluorine."

Dr. Hunter testified that "fluorine compounds are deadly poisons to mammalian tissues;" that when they enter the body they attack the enzymes in the body cells; that fluorine compounds fed in animal experiments produced degeneration of the liver and the kidney; that the symptoms of subacute fluorine poisoning were those which were seen in the Martins. It was his opinion that the Martin family were suffering from subacute fluorosis because their symptoms were identical with those in cases of the character which he had seen previously.

many parts per million of fluorides—would be required to bring about the injuries found, but both attached some significance to the fact that the window in the house was etched by acid. As stated by Dr. Capps, "I think that if there is enough fluorine to etch a window, it should be able to etch a lung." Dr. Hunter related his own experience in finding in England a family with the same symptoms as the Martins who lived in a house near an industrial plant[a] whose windows were similarly etched and said that the etching he observed in the glass taken from the Martin home was an indication of excessive quantities of fluorine in the atmosphere. He referred to studies made in 1940 warning the industrial world "against throwing into the atmosphere an effluent which would etch glass."

A further circumstance which the medical witnesses emphasized was that in the case of the Martins their abnormal symptoms were reduced and lessened after they had moved away from the vicinity of the plant. We are thus led to the conclusion that the jury was warranted in finding, as they did, that physical injuries to the Martins were caused by the fluoride emanations from the plant which found their way to the Martin place.

[a] This was an ironworks which produced the same fluoride effluence.

On behalf of the defendant evidence was adduced to show that only a very small concentration of fluorides could have reached the Martin home. We think the jury were warranted in accepting plaintiffs' testimony, and the inferences therefrom, that excessive amounts of fluorides reached them, for they actually suffered fluoride poisoning. There was no proof on the part of plaintiffs as to what particular percentage or concentration of fluorides was necessary to produce such results. Plaintiffs were obliged to accept in that respect the concession made by the defendant to the effect that such fluorides are "poisonous in excessive amounts." The only possible conclusion is that because the damage was actually caused by the fluorides, they somehow managed to get there in excessive quantities. We think we must accept this as a permissible finding of the jury.

The important question is whether there was proof of any negligence or other breach of duty on the part of the defendant which brought about these injuries as its proximate result.

In our former opinion, in the case of Paula Martin (Reynolds Metals Company v. Paula Martin Yturbide, April 24, 1957, not reported), this court expressed the view that these plaintiffs were entitled to recover under the doctrine of Fletcher v. Rylands, 3 H. & C. 774, affirmed in Rylands v. Fletcher, L.R. 3 H.L. 330, and

referred to certain Oregon decisions which were thought to recognize a doctrine of strict liability, or liability without fault. What we said there about that doctrine and its possible application here is now withdrawn. As is hereafter developed, a discussion of that problem is unnecessary to a decision of this case. Furthermore, this case was not submitted to the jury which heard it upon any such theory.[7]

Appellant argues that there is a complete absence of proof of any want of care on its part in the operation of the aluminum plant. In this respect its contention is that before the plant was put in operation it equipped it with facilities for minimizing the amount of effluents that escaped from the plant. Each potroom building was equipped with a ventilator extending the full length of the building at the roof or ceiling. Air was supplied to the room through louvre doors at the base and the heated air carrying the escaping gas, fumes and particulates moved upward to the ventilators. At the ventilators a washing system was installed which consisted of a series of sprays running the full length of the building so that any air that left the building had to pass

[7] See Martin v. Reynolds Metals Co., 135 F. Supp. 879. The able trial judge, expressing doubt that the doctrine of Fletcher v. Rylands would be applied by the Oregon Court to a case of this kind, held that the case should go to the jury upon the issue of negligence. Although in appropriate cases a judgment may be affirmed upon grounds other than those adopted in the court below, we think it questionable that such rule is applicable where the judgment is based upon the verdict of a jury acting upon instructions not comprehending the new grounds urged.

through these sprays. After the spray system was first started, baffles were inserted to intercept and condense the moisture which came from the spray into the escaping air; in other words, to take "mist" out of the air. The result of this spray system was that it removed some 60 percent of the fluorides from the air coming through the roof so that only 40 percent of these compounds actually escaped from the plant.

Defendant's Assistant Vice-President testified that during this period from 1946 to 1950, when the spray system of fluorides elimination was in use, the company was carrying on experiments to devise and find better ways of making a more efficient capture of the effluents. In 1948, a pilot plant was designed for the purpose of trying out an improved system of elimination, and as a result of the experiments with that pilot plant, it was arranged about May, 1949, to change over to a new system. The installation of that was completed in November, 1950. The new system involved the placing of hoods over each pot and the installation of fans which sucked the air coming from the pots upward and forcing it through sprays and washtowers. The result of the use of this improved system was to eliminate 90 percent of the fluoride compounds from the air which escaped from the plant. While, as we previously indicated, the average pounds of fluorine escaping per day during 1947 were 2845 and in the month of March, 1950, they

were as high as 3988 pounds, yet beginning in July, 1950, when the new system began to be used, there was a sharp reduction so that in November and December, 1950, after the completion of the improved system, the average daily flow of fluorine escaping was reduced to 643 pounds. In short, by this improved method, the portion of the emanating fluorides which reached the aid were 10 percent of the total as against 40 percent under the earlier system.

In determining the duty of care the law imposed upon the defendant, it is to be borne in mind that the ordinary care which the law requires of such a defendant is measured in part by the defendant's knowledge of potential dangers. Thus a seller of fur coats who actually knows that some few persons are especially susceptible to poisoning by a particular fur dye must take precautions accordingly, and greater precautions than would be required if he were ignorant of this particular susceptibility. Gerkin v. Brown & Sehler Co., 177 Mich 45, 143 N. W. 48. As stated in the Restatement of Torts, §289, in determining the standard of reasonable conduct, "the actor should recognize that his conduct involves a risk of causing an invasion of another's interest, if a person, possessing . . . such superior perception as the actor himself has . . . would infer that the act creates an appreciable chance of causing such inva-

sion." Comment (n) under this section headed "Superior knowledge" recites: "If the actor has a wider knowledge, whether gained from personal experience or otherwise, the propriety of his judgment as to the risk involved in his conduct is determined by what a reasonable man having such knowledge would regard as probable." This requirement of conduct proportioned to the superior knowledge and intelligence of the actor is developed at length in discussions on the subject in Prosser on Torts, 2nd ed., pp. 132 to 134, and in Harper & James, The Law of Torts, §§16.5 and 28.4. Not only that, but it was the duty of one in the position of the defendant to know of the dangers incident to the aluminum reduction process. As the last named authors point out in §16.5, "The manufacturer must learn of dangers that lurk in his processes and his products."

The record here amply demonstrates that the defendant was fully aware of the potential dangers in the escape of fluorides. It is not questioned that numerous claims of injury to cattle from the operation of such plants had been presented to this and other manufacturers. The defendant's senior chemist at the Troutdale laboratory testified that he was familiar with the literature upon the toxic qualities of these fluorides: that he knew that in quantities they were toxic: that some of these were heavier than air and would reach the

earth after being air-borne; that quantities of them would drift in the direction of the Martin land and that there were publications, which dealt with dangers to human beings from fluorides.

The question is whether in view of the knowledge which the company was reasonably required to have as a manufacturer in this field, and the knowledge which it actually did have of the potential dangers of these escaping fluorides, there was evidence of a failure to use reasonable care for the protection of persons in the situation of the Martins.

On behalf of the defendant it was testified that at all these times defendant was utilizing and had installed the latest and best known means of protecting against the escape of the fluorides; that the company, continually studying the problem, installed an experimental pilot plant to develop a new process and then changed over to the improved process as soon as its feasibility was developed.

On behalf of plaintiffs it was urged that the evidence warranted a conclusion that the company did not exercise the care in this direction which it might have done in that it allowed the plant to be operated with the less efficient elimination system from 1946 until 1950 whereas proper care required an earlier use of the better devices.

The only bit of evidence which was taken to sustain such a contention is found in the testimony of Dr. Hunter who testified as follows: "Q. (By Mr. Mead) Doctor, are you familiar with an induced air system of dust control or fume control? A. Naturally, I haven't been trained as a ventilating engineer. But since I first studied industrial hygiene in the Harvard School of Public Health with the famous Phillip Drinker—he is a ventilating engineer—and because of the work which I have to do and so teach, which is industrial medicine, I am, naturally, interested in systems of ventilation. And in all of the chapters of that book there is an exact description of systems of ventilation which are used in various parts of the world. And in 1946 it was well known to all industrialists the world over that exhaust ventilation could be effectively applied to remove these effluents."

Possibly we can assume that the question relating to an "induced air system" referred to the sort of system established by the company in 1950. Testimony that such a system was well known in 1946 would permit an inference that failure to use that better system at that time constituted negligence. We believe it is unnecessary in reaching our ultimate conclusion here to draw such inference from this single answer in this long record for we are of the opinion that the trial court

properly submitted to the jury the question of negligence on the part of the defendant on the theory that this was a case correctly permitting the application of the doctrine of res ipsa loquitur.

The court instructed the jury as follows: "Under the law and the facts of these actions, the defendant was the sole operator and in exclusive possession and direct control of the aluminum plant involved during the time involved, namely, between on or about September 23, 1946, and November 30, 1950. Further, that under the ordinary course of events, it is unexpected that persons being in the vicinity of such a plant would be injured or harmed by fluorine compounds emanating therefrom, and that such a mishap would not occur." The statement in the first of these two sentences is unquestionable; the second sentence is in conformity with defendant's theory and much of the evidence adduced by it at the trial. The instruction was consistent with the testimony that the plant as equipped and operated, would not cause fluorosis to persons who had not been employed in the plant itself. The court noted that there was no evidence as to the amount or concentration of fluorides that would bring about fluorosis in the case of such persons. While during the critical period here 10 percent of the gases, fumes and particulates got by the sprinkler system and escaped into the air the fluorine

contents aggregating hundreds of pounds all told, the tests made at various localities near the plant and on every side thereof, according to defendant's witnesses, produced no significant concentration of fluorides at the time the tests were made. Hence, the court, accepting this proof, told the jury that, "in the ordinary course of events it is unexpected that persons being in the vicinity of such a plant would be injured or harmed by fluorine compounds emanating therefrom."

In so ruling the court in effect determined that the accident was of a kind which ordinarily does not occur in the absence of someone's negligence. That is a prime condition for the application of the so-called rule of res ipsa loquitur. Said the court (135 F. Supp. at 381): "Here was an instrumentality that was in the exclusive possession and control of the defendant. Something that ordinarily we would not expect to happen did happen and damage resulted. This is the pure and simple test as the court sees it of res ipsa loquitur."[8] The court was using language similar to that of Ritchie v. Thomas, 190 Or. 95, 224 P. 2d 543, 551: "'An inference of negligence may arise only when injury is caused by an in-

8. The court cited and relied upon Suko v. Northwestern Ice & Cold Storage Co., 166 Or. 557, 113 P. 2d 209, 213, where the following language is used: "In the ordinary course of matters the mishap would not have occurred except through carelessness in the construction, inspection or use of the tank. And, as hereinabove stated, the premises on which the tank was located were in the exclusive possession and under the direct control of the defendant. Therefore, the doctrine of res ipsa loquitur applies."

strumentality which is under the control and management of the defendant, and when the accident is such as, in the ordinary course of events does not happen, if those who have the management use ordinary care." Such is the test generally approved in such cases. See Prosser, Law of Torts, 2nd Ed., p. 201; Harper and James, The Law of Torts, §19.6.

Just what caused this not-ordinarily-to-be-expected scattering of fluorides in "excessive amounts", was not specified. That they were so scattered the jury was warranted in finding. What concerns us here is that the trial judge was justified in paraphrasing the language of the Suko case (supra, note 8): "In the ordinary course of matters the mishap would not have occurred except through carelessness . . . ." Whether this want of care was in faulty construction, faulty inspection, or faulty operation of the fluorides elimination system, plaintiffs were not required to show, for wherever the fault lay, it was necessarily that of the defendant which had exclusive control. Of course the inference of negligence referred to in Ritchie v. Thomas, supra, is merely a permissible one, Bedal v. Hallack and Howard Lumber Company, 9 cir., 226 F. 2d 526, 538, but it carries the case to the jury.

Viewing plaintiffs' case in the most favorable light, as we are required to do, we have the following: (1),

Damage to persons in the position of the Martins was possible from "excessive amounts" of fluorides; (2) the Martins were poisoned and from this plant and by these fluorides; (3), from this it is permissible to infer that "excessive amounts" reached them,—that there were such excessive amounts; (4), the emission of excessive amounts from the plant was circumstantial evidence of negligence. Res ipsa loquitur.

Appellant says that the res ipsa rule was misapplied here. It quotes from this court's decision in Orr v. Southern Pacific Company, 9 cir., 226 F. 2d 841, 843, the statement: "Res ipsa loquitur is a procedural rule as to evidence. It is never valid in the face of facts which adequately explain the occurrence." Here, it asserts, it made an adequate explanation of the occurrence. It says: "Reynolds, as has been shown, used the greatest possible care, far above that required by any reasonable risk of human injury."

The Orr case presents a different situation for the judge who found the facts decided for the defendant. In the present case the jury might have accepted defendant's proof and explanation but obviously it did not. It was not obliged to do so. The procedural problem which faces any defendant such as this, as it has developed in the cases, is discussed at some length by both Prosser and Harper & James. The latter say, (§19.12

"Defendant in a res ipsa case may show by evidence how the accident happened, but ordinarily this does not entitle him to a directed verdict. The jury may still reject the evidence or find that the explanation does not preclude the likelihood of negligence . . . In most res ipsa loquitur cases, defendant cannot definitely explain the accident. His usual defense consists of proof of the precautions he did take in constructing, maintaining, and operating the injuring instrumentality. Once in a great while such proof may conclusively show that the accident did not in fact happen, or that it was not caused by defendant. But this is seldom the outcome. And where it is not, defendant is in this dilemma: the less effective his precautions to prevent the occurrence the more apt they are to appear negligent; the more effective the precautions testified to, the less likely they are to have [been] taken in this case since the accident did happen."[9]

[9] The authors quote the following from Minutilla v. Providence Ice Cream Co., 50 R.I. 43, 49: "If the care commonly used by defendant had been exercised the presence of these pieces of glass in the cream sold to plaintiff would have been impossible. Yet the fact remains that there they were . . ." (Footnote 6, p. 1106)

Prosser discusses the same matter (pp. 216-217) as follows: "But if the defendant merely offers evidence of his own acts and precautions amounting to . . . onable care, it is seldom that a verdict can be directed in his favor. The inference from the circumstances remains in the case to contradict the evidence. If he testifies that he used proper care to insulate his wires, to inspect his chandelier, to drive his bus, or to keep defunct mice and wandering insect life out of his bottled beverage, the fact that electricity escaped from the wires, that the chandelier fell, that the bus went into the ditch and the bug was in the bottle, with the background of common experience that such things do not usually happen if proper care is used, may permit reasonable men to find that his witnesses are not to be believed, that the precautions described were not sufficient to conform to the standard re-

Here the jury were instructed at length to the effect that the plaintiffs' claims were based upon their assertion that defendant had been guilty of negligence. The nature of their claim and the negligence asserted was stated by the court to the jury in substantially the same language as that set forth in the pretrial statement quoted above. The court stated the contentions of the defendant in respect to this claim of negligence; it defined negligence and set forth that the plaintiffs were required to prove not only negligence but that such negligence was the proximate cause of the injury or damage. There is no contention here that these terms were not adequately defined in the instructions.[10]

When res ipsa loquitur is applied the facts of the occurrence warrant the inference of negligence. They furnish substantial evidence of negligence where the

quired or were not faithfully carried out, and that the whole truth has not been told. It is of course not impossible that proof of proper care may be so overwhelming as to call for a directed verdict, but in the ordinary case it will not be sufficient to destroy the inference from res ipsa loquitur."

10. Included in the instructions were the following:

"Negligence on the part of any person is never presumed, and you cannot find a person liable, merely from the fact alone, that a mishap has occurred and that a person has suffered an injury. The defendant is not an insurer against injury to persons residing in the vicinity of its Troutdale plant. The question is whether or not there was negligence on the part of the defendant in the course of the operation of its plant. Before a person can be held liable for actionable negligence, causing an alleged injury, there must be some duty upon that party, and failure to perform that duty, which produces or concurs or joins in producing, the proximate cause of a resulting injury complained of."

"The burden of proof in all cases rests upon the party having the affirmative of the issue, and in these cases, the burden of proving by a preponderance of all of the evidence in the case negligence on the part of the defendant and such negligence, if any, was the proximate cause of the injuries complained of by each of the three respective plaintiffs, rests upon those plaintiffs throughout the trial."

direct evidence of it may be lacking, but they make a case to be decided by the jury.[11] In finding itself in the dilemma mentioned by Harper & James in the language quoted above, appellant is in no different situation than any other defendant who finds itself in a res ipsa case and before a jury. It is not, as appellant asserts, the victim of the application of a rule of absolute liability.

Appellant contends that the court misconstrued and misapplied the res ipsa loquitur doctrine in that it failed to use the language quoted above from Ritchie v. Thomas to the effect that the inference of negligence permissible under that rule may arise "when the accident is such as, *in the ordinary course of events does not happen, if those who have the management use ordinary care.*" (Italics ours)

We have noted above that it is plain that the trial court had this particular requirement in mind when it stated in its instruction to the jury that "under the ordinary course of events it is unexpected that persons being in the vicinity of such a plant would be injured or harmed by fluorine compounds emanating therefrom." The court's reported opinion, previously cited, dealing

[11] Sweeney v. Erving, 228 U.S. 233, 240: "In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient, that they call for explanation or rebuttal, not necessarily that they require it, that they make a case to be decided by the jury, not that they forestall the verdict."

with the rule of res ipsa loquitur, in citing and relying upon Suko v. Northwest Ice & Cold Storage Co., supra, which fully and correctly defined the fact situations which warrant res ipsa loquitur, was not confused as to what the requirements for the application of that rule were. That the language used by the court in its instruction to the jury was not in the precise language employed in Ritchie v. Thomas, supra, is not a circumstance of which appellant may here complain. In the first place the instructions were not objected to upon any such ground.[12]

Appellant objected first that the doctrine of res ipsa loquitur was not applicable in a case of this kind, and second, that it was not applicable here since any inference of negligence had been rebutted by affirmative proof. The point now sought to be made—that the definition of the conditions under which the rule would apply were incorrectly stated—were not the subject of the objection. See Rule 51 FRCP. Furthermore, any inaccuracy in the court's reference to the res ipsa loquitur

[12] "May it please the Court, the defendant respectfully excepts and objects to the instructions given by the Court as to the applicability of the doctrine of res ipsa loquitur on the grounds that: one, that doctrine is not applicable here as a matter of law by reason of the fact that the claims asserted are phenomenal and unique in nature, and under the circumstances, the doctrine is not generally applicable in cases of that type; secondly, that this doctrine should not have been instructed, with respect to the res ipsa loquitur doctrine, because of the fact that the same is designed to give rise to an inference to take a case to the jury, and the evidence is clear here that there was no negligence, and the inference, if any, was rebutted by the affirmative proof with respect to the matter of negligence."

rule as explained to the jury was of no consequence since under the Oregon rule the court was not required to instruct the jury on this subject. Ritchie v. Thomas, supra. We have no occasion to consider whether it was error to refer to the rule of res ipsa loquitur in instructing the jury for no objection or exception was taken on that ground.[13] We cannot see that the instruction was prejudicial,—certainly not in any respect referred to in the appellant's objections or exceptions to the charge.

Appellant contends that the claims of plaintiffs Paul and Verla Martin are barred by the Oregon two year statute of limitations, Oregon Rev. Stat. §12.110. These suits were filed January 7, 1952.[14] The question is whether the causes of action arose prior to January 7, 1950. The period of the Martins' exposure to the fluorides continued from December, 1946, to November, 1950. There was testimony that the symptoms had appeared before the end of 1948. Appellant's argument is based upon the case of Piukkula v. Pillsbury Astoria Flouring Mills Co., 150 Or. 304, 42 P. 2d 921. In that case the plaintiff suffered an occupational disease caused by his exposure to the flour dust in the mill. On September 17, 1930, plaintiff experienced difficulty in

13. "Whether it would be reversible error for a trial court to instruct on the inference which arises in this type of case is a matter which need not now be decided." Ritchie v. Thomas, supra (224 P. 2d at p. 551).

14. As Paula Martin was a minor there is no claim that the statute had run as to her.

breathing; in January, 1931, he quit his work in the mill; on January 22, 1933, he, for the first time, realized the extent and seriousness of his illness, and on June 8, 1933, he instituted an action to recover damages for the injuries to his health. The action was held to be barred by the two year statute.

We think that that case is distinguishable from the present one, which would appear to be covered by the rule laid down in the later cases of Shives v. Chamberlain, 168 Or. 676, 126 P. 2d 28, and Hotelling v. Walther, 169 Or. 559, 130 P. 2d 944. Those were cases in which the plaintiff sought recovery for medical malpractice because of the alleged negligent treatment of the patient. In each case the treatment continued for a long period of time. It was held that the statute did not begin to run until the treatment was discontinued. In the first of these cases the court said: "This continued treatment, ... constituted a continuing tort causing the statute of limitations to start only when such treatment ceased." (126 P. 2d 31) In the second case it was said: "The alleged negligent treatment of the plaintiff must be considered as a whole. Plaintiff was not obliged to split his cause of action. The continued negligent treatment constituted but a single cause of action. Where the tort is continuing, the right of action is continuing . . . The rule that the statute runs from the

last date of the continuous negligent treatment is just and equitable." (130 P. 2d 946)

In the Piukkula case, on which appellant relies, the period of the receipt of damages from dust ended when the plaintiff quit his job and left the harmful place. This was more than two years before the commencement of the suit. In the case now before us the tort, which was a continuing one, had not terminated in November, 1950, and the statute had not run when the suit was filed in January, 1952.

Appellant also assigns error in the cases of Paul and Verla Martin in the action of the court in limiting the examination upon deposition of two doctors as to information given to these doctors by the two plaintiffs when they were consulted for treatment. Shortly after the actions were commenced, the appellant served upon each of these plaintiffs written interrogatories pursuant to Rule 33 of the FRCP and thereafter appellant took their depositions pursuant to Rule 26 of the same rules. From these it appeared that Paul and Verla Martin had consulted a Dr. Hills and a Dr. Proctor in connection with their claimed injuries. Shortly before the trial appellant sought to take the depositions of these two doctors and plaintiffs moved under Rule 30(b) to have the scope of examination limited so as not to permit examination of either doctor concerning information ac-

quired by them in attending the plaintiffs and which was necessary to enable the doctors to prescribe or act for them. Appellant opposed the motion on the ground that the Martins had waived their privilege with respect to such information by disclosing on their interrogatories and in their depositions facts concerning their physical condition. Holding that the answers of the plaintiffs in their interrogatories and statements on the deposition did not reveal either an express or implied waiver of their privilege created by the Oregon statute, the court granted the order requested limiting the extent of the inquiry in the taking of the depositions.

In dealing with this assignment of error in the opinion of a division of this court on April 24, 1957 (unreported), this court said: "The federal courts look to the state law to determine whether the physicians bear a confidential relationship to their patients. Engl v. Aetna Life Insurance Co., 139 F. 2d 469 (2 cir., 1943). The applicable Oregon statutes provide: Or. Rev. Stat. §44.040(1)(d): 'A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action, suit or proceeding, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.' Or. Rev. Stat. §44.040(2): 'If a party to the action, suit or proceeding offers himself as a witness, it is deemed a

consent to the examination also of a physician or surgeon on the same subject."

Appellant contends that Verla Martin had *offered* herself as a witness because when made a witness by appellant by interrogatories submitted under F.R.C.P. 33 and questioned in a deposition taken by appellant under F.R.C.P. 26 in which her attorney sought no cross-examination, she had not availed herself of her privilege to refuse to answer questions concerning her treatment by two Maryland doctors but had testified concerning their treatment and advice.

Appellant's interrogatories were answered in March, 1952 and its questions in the deposition in May, 1952. Instead of attempting to take the depositions of these doctors promptly, it was not until two and a half years later when the case was set for trial on July 25, 1955, that appellant gave notice of taking of the doctors' testimony in Baltimore on July 16, 1955. Because of the expense to the Martins in sending a lawyer to Baltimore, Mrs. Martin moved for a ruling on the right to take her physicians' testimony and the district court ruled as follows:

"Reference is made to the plaintiff's objection to the taking of the depositions of Drs. Hill and Huntley in the State of Maryland now set for tomorrow morning. The Court has examined the defendant's *interrogatories*

presented to the plaintiffs, and is of the opinion that their answers and statements (exclusive of Paula Martin) do not reveal either an expressed or implied waiver of their (Paul Martin and Verla Martin) right of privilege created by §44.040 ORS.

"Therefore, the depositions of said doctors, so far as questions and interrogatories relate "to any information acquired (by either of the doctors) in attending the patient (either of the plaintiffs) which was necessary to enable him to prescribe or act for the patient," is violative of plaintiff's mentioned privilege, and to that extent the objections should be sustained."

"That is to say, the district court held it is the law of Oregon that [in] merely answering a question from her opponent which she might have avoided, [she] still remains the appellant's witness and does not constitute an *offering* of herself as a witness.

"Appellant cites no Oregon case that holds to the contrary and our careful search discloses none. Appellant relies solely on the case of Forrest v. Portland Ry. & P. Co., 64 Ore. 240 (1913), where the court says that the plaintiff in seeking to establish the damages for her personal injuries *'offered herself as a witness'* and testified at length about the extent and nature of her injuries. There is nothing in the Oregon Supreme Court's opinion which remotely suggests that the plaintiff in

that case was testifying as the defendant's witness as was Mrs. Martin here.

In this situation we cannot say from our own study of the law of Oregon that the district judge erred in applying the law of his own state, following the principles established by the Supreme Court in Henderson Co. v. Thompson, 300 U.S. 258, 266 (1937); Thompson v. Consolidated Utilities Corp., 300 U.S. 55, 74-75 (1937); Township of Hillsborough v. Cromwell, 326 U.S. 620, 630 (1945)."

We think for the reasons thus stated it must be said that at the time of the ruling complained of (made on August 16, 1955), prior to the commencement of the trial (which began August 25, 1955), the court was not in error in holding that at the time the proposed depositions were noticed these plaintiffs had not offered themselves as witnesses within the meaning of the Oregon statute. In other words, the ruling of the trial court was correct when made. At the time of the trial these witnesses did offer themselves as witnesses and at that time waived their privilege. At that time Drs. Hills and Proctor would have been proper witnesses. They were not then called, nor was the court at any time during the three weeks' trial asked for a continuance or an order modifying its earlier limitation to permit at the time an enlarged inquiry on deposition to be made of

Drs. Hills and Proctor. Before the court could be put in error in respect to the taking of the testimony of these doctors, defendant must have asked to take the testimony after the privilege had been waived. We hold that in the circumstances appellant has failed to demonstrate that the action of the court in respect to these depositions was prejudicial.

Cross-Appeals Respecting Costs

Each of the three plaintiffs filed cost bills. In the Paul Martin and the Verla Martin cases defendant filed objections to the amounts claimed for witness fees on the ground that the identical items had been claimed and were allowed in the Yturbide case, asserting that multiple witness fees could not be recovered, since the three actions had been consolidated for trial and the witness had testified but once. The court sustained the objections and plaintiffs cross-appealed.

Although an earlier decision of this court, National Union Fire Ins. Co. v. California C. Credit Corp., 70 F. 2d 279, 289, approved allowance of double costs, the statute on which that result was based has been superseded by Rule 42(a) which authorizes consolidation of actions such as these "to avoid unnecessary costs or delay." We think the better rule is that stated in Copeman Laboratories Co. v. Borg-Warner Corp., 89 F. Supp. 161, which suggests that doubling the witness fee does

ance where there has been a consolidated trial would operate to frustrate the stated purpose of Rule 42 a) "to avoid unnecessary costs."

Plaintiff Yturbide has also cross-appealed specifying error in the order of the court limiting costs for the travel expense of witnesses to expenses for travel for a distance of 100 miles from the place of travel. The action of the court was in accordance with the prevailing rule. It is stated, and the authorities therefor cited, in Kenyon v. Automatic Instrument Co., 10 F.R.D. 248. See also Barnhart v. Jones, 9 F.R.D. 423. There was no error in respect to the allowance of costs.

The judgments are affirmed.

Judge Lemmon did not participate in the decision of this case.

CHAMBERS, concurring and dissenting:

I concur in the foregoing opinion except with respect to the specification concerning the limiting order on the taking of the depositions of Drs. Hills and Proctor in Baltimore. Their testimony would have concerned the cases of Paul and Verla Martin. In my view we have not been told by any Oregon state decision what we should do on the point. And, usually I am most reluctant not to follow the opinion of a district judge well versed in the law of his own state on a point peculiar to his state.

Here I think we do an injustice when we say to the defendant, "During the course of trial you should have renewed your request to take the doctors' depositions, that is, have stopped the trial to do it." Ordinarily, that would be a useless sight. With a jury one does not want to stop the main show to run off to a side show in Maryland. That has many perils, not the least of which is the urgency of courts to get on with their business. I would let a plaintiff restrict the taking of testimony or depositions at his own risk, if he should later offer to testify in the restricted area. And, as a trial judge, I would think it plaintiff's error, not mine.

But assuming I am wrong in my foregoing view, I would suggest that if the same problem should appear again in the same frame, the trial judge might well take the matter in hand and advise the plaintiff at the time of entry of the limiting order that if the plaintiff should appear at trial and by his own act of testifying waive the theretofore protected privilege, he, the trial judge, would grant a mistrial on his own motion. This would give effect to an ascertainable Oregon policy. This would stop a game of ducks and drakes.

(Endorsed:) Opinion and Concurring and Dissenting Opinion. Filed June 5, 1958.

Paul P. O'Brien, Clerk.